NO. 2264

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CONTINENTAL AND COMMERCIAL TRUST & SAVINGS BANK, a corporation, and FRANK H. JONES, Trustees, Appellants,

vs.

COREY BROTHERS CONSTRUCTION COMPANY, a corporation, and UNION PORTLAND CEMENT COMPANY, a corporation, Appellees.

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

BRIEF OF APPELLANTS.

MAYER, MEYER, AUSTRIAN & PLATT,
AMOS C. MILLER, ESQ.,
Chicago, Illinois,
RICHARDS & HAGA,
Boise, Idaho,
Solicitors for Appellants.

Records of U.S. Circuit
Court of Appeals
8/6

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STATEMENT OF THE CASE.

This is an appeal by the trustees under two trust deeds securing two mortgages upon the Big Lost River Irrigation System located in Idaho, from a decree of the District Court for the District of Idaho establishing a mechanic's lien in favor of Corey Brothers Construction Company and the Union Portland Cement Company and directing that a sale be made, without redemption, to satisfy such liens unless the Irrigation Company should pay the amount of such liens within five days. This appeal is taken on behalf of the holders of the outstanding bonds

secured by said trust deeds, about $1,380,000 in amount, the lien of which is held by the District Court to be subject to the mechanic's liens aforesaid. A brief statement of the case, and of the points involved on this appeal is as follows:

The Big Lost River Irrigation Company is an Idaho corporation, chartered June 15, 1909. Shortly before that date its incorporators made a verbal agreement with Corey Brothers Construction Company, a corporation of Utah, to construct the irrigation system in question, consisting of a dam, canals, laterals, etc. A written contract, complete in all respects and details, with the exception of the signatures of the parties, the Irrigation Company and the Construction Company, was drawn up and delivered at that time. Its actual execution by writing in the names of the officers who acted for the two corporations in executing the document occurred on August 26th following. This written agreement is plaintiff's Exhibit 23. It was complete, including the typewritten names of the signers, at the time the verbal agreement was made; the subsequent signing of the officers merely constituted better evidence of the terms of the agreement. This agreement was recognized and ratified by the Irrigation Company from the time of its incorporation, and from that time payments were made by the Irrigation Company to the Corey Brothers Company for work done under the contract.

The irrigation system in question is what is known as a "Carey Act project", constructed under a contract entered into by the State of Idaho with one George S. Speer, dated May 27, 1909 (Rec. 457), all rights under which contract were subsequently, with the consent of the State,

transferred by Speer to the Irrigation Company upon the organization of the latter. This contract was made pursuant to the statute of Idaho (Revised Code, Secs. 1613 to 1634 inclusive), accepting and providing for operations under the so-called "Carey Act" of Congress.

A trust deed covering all the property of the Irrigation Company to secure a $2,000,000 issue of bonds bearing date July 1, 1909, was executed under date of July 1, 1909, acknowledged August 27, 1909, and filed for record September 3, 1909. Subsequently, on January 1, 1910, another trust deed conveying the same property and securing an additional bond issue of $400,000 was executed and placed on record. These appellants are named as trustees in both trust deeds. The bonds secured by the trust deeds were delivered by the Irrigation Company to Trowbridge & Niver, a bond house of Chicago, who sold the bonds, and it was out of these sales Corey Brothers Construction Company was paid all of the sum of $691,119.48, which it received on account of its work done under the aforesaid contract (Rec. 355).

Corey Brothers Construction Company began work under this contract (then verbal) about June 15, 1909, that being the date on which the Irrigation Company was chartered. It continued working upon the contract until August 15, 1910, at which time the State of Idaho, through its State Land Board, had ordered work to cease upon the dam, and that no further sale of water rights be made, because, owing to faults in its construction, consequent on departures from the contract with the State, the dam was considered dangerous to life and property; and before that time also the Irrigation Company had ceased making

payments to the Construction Company upon the estimates of the engineers, the Arnold Company.

Practically all the payments made to the Construction Company were made by Trowbridge & Niver as fiscal agents of the Irrigation Company. The engineering work upon the project was done by the Arnold Company, a corporation, of Chicago, who also made the estimates upon which payments were made to the Construction Company.

Corey Brothers Construction Company did not comply with the laws of Idaho relative to foreign corporations, or secure its license to do business in that State until August 5, 1909, nearly two months after it entered into the contract on which suit is brought, and began the execution of it in Idaho.

It is conceded that the dam is a failure because it leaks to such an extent that to attempt to impound in the reservoir the head of water designed (110 feet), or any useful quantity of water, would endanger the stability of the dam and become an imminent menace to life and property. As a result of this condition of the dam the State of Idaho on July 15, 1910, after a full and careful examination by a Board of Engineers, stopped all further work upon the dam and inhibited all further sale of water rights by the Irrigation Company, thereby, of course, putting an end to all further sale of securities based upon the irrigation system, and thus depriving the Irrigation Company of all right to collect on water rights already sold, and all means with which to pay for further construction work. It is our contention that this failure of the dam was due to the fault of Corey Brothers Construction Company in failing to observe its contract with the Irrigation Company.

This contract, dated August 26, 1909, but actually entered into about June 15, 1909, had attached to it as a part of it, detailed specifications for the construction of the dam as well as the canal system. These same specifications, word for word, were a part of the contract of May 27, 1909, between the State of Idaho and George S. Speer, subsequently transferred by Speer to the Irrigation Company. The State of Idaho stopped the work upon the dam because it had determined through its engineers that the construction of the dam was in violation of these specifications, which were a part both of the contract between the Irrigation Company and the State, and of the contract between the Irrigation Company and the Construction Company. This determination by the State of Idaho, then, was equivalent to a determination that the Construction Company had violated its contract with the Irrigation Company in the construction of the dam. The evidence is clear and undisputed that the faults in the construction of the dam are such that they cannot be corrected except at an expense which would be prohibitive. In other words, it would be cheaper to rebuild the dam or reconstruct it on some other plan; and the expense of so doing would approximate the expense of constructing this dam according to the original plans from the beginning.

Our first defense, therefore, to this action to foreclose mechanic's liens, is that the plaintiff did not comply with its contract and that the deviations were of so serious a character as to make the result a materially different result from that contemplated by the contract between the parties. It is not denied that the Construction Company, by filing its claim for lien in the office of the Recorder of Deeds for the various counties where the works are sit-

nated, took the proper formal steps to establish a lien, if it is entitled to one.

Under the laws of Idaho a foreign corporation, before becoming entitled to do business within the State, must apply for and secure a license to do business therein, filing a copy of its charter, paying the necessary fees and appointing an agent for the acceptaance of service. This was done by the Construction Company August 5, 1909, a little less than two months after it entered into the contract in question and began its execution in Idaho. Under the statute of Idaho as construed by the Supreme Court of that State, such a contract is not void, for the non-complying corporation may be sued upon it by the other party to it. Such a contract, however, is unenforcible by the corporation; and the non-complying foreign corporation is by the laws of Idaho denied the status of a corporation. For this reason, also, we claim that this suit should fail.

This action by Corey Brothers Construction Company to foreclose this lien was begun in the District Court of Idaho on October 15, 1910. The Irrigation Company and these trustees were made defendants. One week later, October 22, 1910, the Union Portland Cement Company filed suit in the same court to foreclose its lien, making the same parties defendant. Afterwards Corey Brothers Construction Company amended its complaint, making defendants the Union Portland Cement Company, a Utah corporation, and several other lien claimants, also, like the plaintiff and the Cement Company, citizens of Utah. In the January following, 1911, before the new defendants had pleaded, the Court, on the motion of Corey Brothers Construction

Company, dismissed the action as against the Cement Company and the other residents of Utah. On May 29th following the Court appointed a receiver of all the property of the Irrigation Company. Thereafter, in January, 1912, the Union Portland Cement Company filed in this suit its petition in intervention, asking for a foreclosure of its lien. The record shows that there are other lien claimants who have taken steps to perfect their liens and filed suit thereon in the State court of Idaho, who are not parties to this suit, although under the Idaho statute they are indispensable parties to a suit by another lien claimant to foreclose a lien upon the same property. (See answer of Hansen Bros. et al). These indispensable but absent parties are citizens of Utah, the same as the Construction Company, complainant, and the Union Portland Cement Company, intervenor. Were they present in this suit as parties their presence would oust the court of jurisdiction, because their interests (being claims for liens upon the same property sought by the plaintiff to be subjected to a first lien) are necessarily opposed to that of the plaintiff. Though there is no plea of nonjoinder of indispensable parties, the record shows their existence. Their presence would oust the court of jurisdiction. This was the state of the record also at the time the receiver was appointed; and the Court, therefore, at that time lacked the power either to determine the cause or to appoint a receiver.

It is our contention further that an irrigation system constructed under the Act of Congress known as the "Carey Act", being Section 4 of the Act approved August 4, 1894, as amended by the Act of June 11, 1896, Section 1; and of March 3, 1901, Section 3; and under Sections

1613 to 1634, inclusive, of the Revised Codes of Idaho, is not subject to a mechanic's lien under the statutes of Idaho relating to liens.

It is shown, we contend, by a preponderance of the evidence (though denied by Corey, the President of Corey Brothers Construction Company) that when he entered into the contract with the Irrigation Company, evidenced by Plaintiff's Exhibit 23, he knew it was the intention of the Company to at once place upon the property of the Company a trust deed securing a bond issue, which bonds were to be sold to provide the money to pay the Construction Company for its work under the contract. All of the money received by Corey Brothers Construction Company consisted of the proceeds of the sale of those bonds to these bondholders represented by the Trustees. We claim it would be inequitable to allow the Corey Brothers Construction Company a priority of lien over these bondholders whose money, given in payment for the bonds, has already gone into the pocket of Corey Brothers Construction Company; and that, therefore, the Construction Company is estopped to claim a priority over the bondholders.

The decree of the district court in this case contains certain provisions, which we contend are erroneous, even if the plaintiff is entitled to a decree foreclosing his lien. They are as follows:

First. The decree recites, among the rights of the Irrigation Company which are directed to be sold for the payment of the liens, all lands mentioned in Segregation List No. 8; all lands mentioned in Segregation List No. 18 and all rights in State Desert Land List No. 31. (Rec. 672). The Irrigation Company has not and never had rights in

those lands, except a lien thereon for the payment of the balance of purchase price for water rights. The greater portion of those water rights have been sold by the Irrigation Company. Those contracts under which the Irrigation Company is to receive pay for water furnished have been deposited with these Trustees to secure the payment of the bond issue. Payments to be made upon these water contracts constitute the Irrigation Company's only source of income. It will scarcely be contended (and was not contended in the court below) that these contracts should be sold for the payment of plaintiff's lien. The Irrigation Company has no interest in the lands mentioned in said Segregation Lists which is subject to sale, unless it be those water contracts; and the decree should not contain language which might be construed as authorizing the sale of those contracts.

Second. The decree provides for a sale without redemption, contrary to the statutes of Idaho.

Third. The decree provides for a sale of the construction contract between the State of Idaho and the Irrigation Company, dated May 27, 1909.

Fourth. The decree provides for a sale of the water rights and interests in the irrigation system, previously sold by the Irrigation Company to settlers, and the latter are not parties to the suit, and the payments due under the sale contracts have been assigned to and pledged with these appellants as additional security for the bond issue.

Specifications of Errors Relied on.

The errors relied upon by appellants are set forth in detail in the Assignment of Errors (see Record, p. 681-690). Stated generally, they are:

First. The Court erred in decreeing a lien in favor of Corey Brothers Construction Company, because the record shows that said Construction Company in constructing the dam and irrigation works so far departed from its contract with the Big Lost River Irrigation Company as to render the dam practically worthless and the irrigation system unfitted for the purpose for which it was intended to be constructed.

Second. The plaintiff, Corey Brothers Construction Company, a Utah corporation, having entered into the contract upon which the suit is based and having entered upon the execution of the contract in Idaho before securing a license to do business within the State of Idaho, is in no position to bring suit to enforce a lien based upon that contract.

Third. Because the Court is without jurisdiction, for the record shows the existence of indispensable parties to this suit to foreclose a lien upon this property, which parties are not before the Court and were not before the Court at the time of the appointment of the receiver, having been theretofore wrongfully dismissed on plaintiff's motion.

Fourth. The plaintiff, Corey Brothers Construction Company, having known when it entered into its contract to construct this irrigation system, that its pay for work done thereunder must come from the proceeds of bonds sold to the bondholders represented by these Trustees, and having received nearly seven hundred thousand dollars from these bondholders, are estopped from claiming a priority of lien over such bondholders, who purchased without knowledge of plaintiff's lien.

Fifth. This irrigation system and works are not subject to a lien under the Mechanics' Lien Statute of Idaho.

Sixth. The District Court erred in decreeing a sale of the assets of the Big Lost River Irrigation Company without the right of redemption.

Seventh. The District Court erred in directing that there be sold to pay the lien of the complainant all lands mentioned in Segregation List No. 8 and all lands mentioned in Segregation List No. 18 and all right, title and interest in and to Idaho State Desert Land List No. 31; and in not specifically exempting from the foreclosure sale all contracts between settlers upon the lands irrigated and to be irrigated by the Big Lost River Irrigation Company's works, and said Big Lost River Irrigation Company, and all sums still due upon said contracts.

Eighth. The Court erred in decreeing a sale of the contract between the State of Idaho and the Big Lost River Irrigation Company.

Ninth. The Court erred in not saving and reserving from the sale ordered to be made, the undivided and proportionate interests in the irrigation system and water rights previously sold by the Big Lost River Irrigation Company to settlers and entrymen under the project, which settlers and entrymen were not before the Court, but were indispensable parties to a suit for the enforcement of the lien against their rights and interests in such irrigation system and water rights, and their respective mortgages (settlers' contracts) on their respective individual and proportionate interests in said system and water rights had been assigned to and pledged with appellantjs' trustees, as security for the bond issue.

First. Plaintiff, without authority, so far departed from the terms of the contract as to make the dam a useless structure and resulted in the condemnation by the State.

(a) The provision of the contract that no change or deviation from the terms of the contract shall be permitted by the engineer, except in writing, is valid and enforceable.

Carter vs. Root, (Neb.), 121 Northwestern, 952.

Langley vs. Rouss, 185 N. Y. 201.

Kelly vs. St. Michael's Roman Catholic Church, decided by N. Y. App. Div. Jan. 1912, reported at page 767 of May 11 issue of Law Reports and Session Laws.

Molloy vs. Village of Briar Cliff Manor, 145 App. Div. (N. Y.) 483.

Bannon vs. Jackson, 117 Southwestern (Tenn.), 504.

White vs. San Raphael R. R. Co. 58 Cal., 417.

Mishoud vs. McGregor, 61 Minn., 198.

Howard vs. Pensacola R. R. Co. 24 Fla., 560.

(b) Drummond, the engineer, had no implied authority from his principal to consent to a departure from the contract for the sole benefit of the contractor.

United States vs. Walsh, 115 Fed. 701, (Court of Appeals, 2nd Circuit).

Town of Sterling vs. Hurd, 98 Pac. 177, (Colo. 1908).

Ryan vs. Reservoir Co. 104 Pac., 221, (Utah, 1909).

(c) The payment of the monthly estimate by the Irrigation Company did not constitute an acquiescence in the departures by Corey Brothers from the terms of the contract.

Mercantile Trust Co. vs. Hensey, 205 U. S. 298.

Hartupee vs. Pittsburgh, 97 Pa. St. 107.

Tharsis Sulphur and Copper Co. vs. McElroy, L. R. Eng. 3 App. Cas. 1040.

United States vs. Walsh, 115 Fed. 701 (Court of Appeals, Second Circuit).

Town of Sterling vs. Hurd, 98 Pac. 177 (Colo. 1908).

Ryan vs. Reservoir Co. 104 Pac. 221 (Utah, 1909).

(d) The departures shown in this case were material and of a character as to defeat the lien.

Elliot vs. Caldwell, 43 Minn. 357.

Spence vs. Ham, 163 N. Y. 230.

Fox vs. Davidson, 36 N. Y. App. Div. 159.

Glacius vs. Black, 50 N. Y. 145.

Anderson vs. Peterert, 86 Hun. (N. Y.) 600.

Bloom, Mechanic's Liens, Sec. 342 and 343.

Perry vs. Quackenbush, 38 Pac. 740.

Schmidt vs. City of North Yakima, 40 Pac. 790.

Leeds vs. Little, 42 Minn. 414; 44 N. W. 309.

W. Va. Bldg. Co. vs. Saucer, 45 W. Va. 483; 31 S. E. 965.

Phillips vs. Gallant, 62 N. Y. 256.

Smith vs. Ruggiero, (N. Y.) 65 N. Y. S. 89.

Hawkee vs. Arundel Realty Co. 98 Minn. 219; 108 N. W. 842.

(e) The bond owners, represented by the trustees, may defend on the ground that the complainant failed to perform its contract to construct the dam.

Eastmore vs. Bunkley, 113 Ga. 637.

Carson vs. White, 6 Gill (Md.) 17.

Adams vs. Central City Granite Brick Co. 154 Mich. 448.

Federal Trust Co. vs. Guigues, 76 N. J. Eq. 495.

Brown and Hoff vs. Cornwell, 108 Va. 129.

Knabb's Appeal, 10 Pa. St. 186.

Dunham vs. Woodworth, 158 Ill. App. 486.

Title Guaranty and Trust Co. vs. Burdette, 104 Md. 666.

Adams vs. Central City S. B.& B. Co. (Mich.) 117 N. W. 932.

Dittmer vs. Bath, 117 Mich. 571.

Thomas vs. Turner, 16 Md. 105.

McAdam vs. Bailey, 1 Phil. 297.

See:

34 *Century Dig.* Sec. 450, p. 2634.

Especially is this true where the owner of the Irrigation Company has not accepted the work under the contract, but, on the contrary, has in his answer denied that the complainant observed its contract. (See Answer of Big Lost River Irrigation Company, par. 9, Record page 46).

Second. Complainant entered into this contract and began work under it long before it complied with the foreign corporation laws of the State of Idaho, and it can neither enforce this contract nor obtain a mechanics' lien based thereon in the Federal Court.

(a) The Constitution and Statute of Idaho, as con-

strued by the Idaho Supreme Court, provide that contracts of non-complying foreign corporations are invalid and unenforceable when sued upon by the corporation, although the defendant must plead the objection or he will be deemed to have waived it, and although such contracts can be enforced against the corporation.

Article XI, Sec. 10, Constitution of Idaho.

Section 2792, Revised Codes of Idaho.

Katz vs. Herrick, 12 Idaho 1, 87 Pac. 873, and cases there cited.

Valley Lbr. Co. vs. Driessel, 13 Ida. 662, 93 Pac. 765.

War Eagle Min. Co. vs. Dickie, 14 Ida. 534, 94 Pac. 1034.

Tarr vs. Western Loan & Sav. Co. 15 Ida. 741, 99 Pac. 1049.

(b) The Federal courts will follow the construction of the highest court of a State in regard to the validity or enforceability of such contracts.

Diamond Glue Co. vs. U. S. Glue Co., 187 U. S. 611, 47 L. Ed. 329.

Chattanooga Bldg. & Loan Ass'n. vs. Denson, 189 U. S. 408, 47 L. Ed. 871.

David Lupton's Sons Co. vs. Automobile Club, 225 U. S. 489, 56 L. Ed. 1177.

Cooper Mfg. Co. vs. Ferguson, 113 U. S. 727.

McCanna & Fraser Co. vs. Citizens' Trust Co., 24 C. C. A. 11, 76 Fed. 420.

(c) In numerous cases involving constitutional and statutory provisions similar to or identical with the Idaho

Constitution and Statutes, the Federal Courts have held that contracts of non-complying foreign corporations could not be enforced in the Federal Courts.

Diamond Glue Co. vs. U. S. Glue Co., (Wis.) 103 Fed. 838.

Diamond Glue Co. vs. U. S. Glue Co., (Wis.) 187 U. S. 611, 47 L. Ed. 329.

Chattanooga Bldg. & Loan Ass'n vs. Denson, (Ala.) *supra.*

In re Conecuh Lbr. Co. (Ala.) 180 Fed. 249.

Thomas vs. Birmingham R. R., Light & Power Co., (Ala.) 195 Fed. 340.

McCanna & Fraser vs. Citizens' Trust Co. (Penn.) *supra.*

Pittsburg Construction Co. vs. West Side, etc., Co., (Penn.) 83 C. C. A. 501; 154 Fed. 929.

Colonial Trust Co. vs. Montello Brick Works, (Penn.) 97 C. C. A. 144, 172 Fed. 310.

Buffalo Ref. Machine Co. vs. Penn H. & P. Co., 102 C. C. A. 196, 178 Fed. 696.

Re Comstock (Ore.) 3 Sawy. 218; Fed. Cas. 3078.

Semple vs. Bank of British Columbia (Ore.) 5 Sawy. 88, Fed. Cas. 12659.

Cyclone Min. Co. vs. Baker Light & Power Co. (Ore.) 165 Fed. 996.

La Moine Lbr. Co. vs. Kesterson (Ore.) 171 Fed. 980.

Evansville & Henderson Traction Co. vs. Henderson Bridge Co. (Ky.) 132 Fed. 402.

(d) Complainant cannot enforce in United States Courts a mechanics' lien based solely upon a statute of

Idaho, under circumstances which would forbid such enforcement in the State Courts.

Section 5110, Revised Codes of Idaho.

Philadelphia Fire Ass'n vs. New York, 119 U. S. 110.

Pembina vs. Pennsylvania, 125 U. S. 181.

The Idaho Supreme Court holds that such non-complying foreign corporation has no legal existence within the State, and it cannot be a person within the meaning of the Mechanics' Lien Statute.

Katz vs. Herrick, supra.

The last sentence in Section 2792 of the Revised Codes of Idaho grants to such foreign corporations only as comply with the Idaho law, the rights and privileges of domestic corporations, and a non-complying foreign corporation is not therefore entitled to a mechanic's lien or to the enforcement thereof in either the State or Federal Courts.

Sction 2792, Revised Codes of Idaho.

Third. The Court is without jurisdiction because the record shows that there are indispensable parties who are not parties to this record; that they are lien claimants against this same property, basing their rights on this same contract, and that they were wrongfully dismissed out of the case on complainant's motion before the appointment of a receiver. The existence of such indispensable parties, lien claimants, is shown by the answer of Hanson Brothers, et al.

(a) Equity Rules 47 and 48 provide for the dismissal of parties who will oust the court of jurisdiction only in case they are not indispensable parties.

(b) Indispensable parties defined.

United States vs. Allen, 179 Fed. 13.

(c) Under the Idaho statute, proceedings of this character are governed by general equity rules.

Sec. 5124, Idaho Code.

Under such a statute, the Court cannot proceed in the absence of indispensable parties.

Kimball vs. Cook, 1 Gilm. 423.

Williams vs. Chapman, 70 Ill. 423.

Lomax vs. Dore, 45 Ill. 379.

Rall vs. Sullivan, 1 Ill. App. 94.

Under Section 4113 and 5120 of the Idaho Civil Code, all lien claimants are indispensable parties.

Section 4113, *supra,* contains the following:

> "But when a complete determination of the controversy cannot be had without the presence of other parties, the Court must then order them to be brought in."

Section 5120, *supra,* provides that the Court in the judgment must declare the rank of each lien claimed.

See also, as to the necessity of all lien claimants in *Gray vs. Havemeyer,* 53 Fed. 174.

See also *Newton vs. Gage,* 155 Fed. Rep. 598.

The question of lack of jurisdiction may be brought to the Court's attention at any time.

Judiciary Act of March 3, 1875.

Morris vs. Gilmer, 129 U. S. 315-326, (32 L. Ed. 690).

Anderson vs. Bassman, 140 Fed. 10.

Fourth. The complainant is estopped to assert a lien superior to that of the trust deed securing the bond, from

the proceeds of the sale of which complainant has been paid nearly $700,000.00.

Dickerson vs. Colgrove, 100 U. S. 580; 25 L. Ed. 619.

West vs. Klotz, 37 Ohio St. 420.

McGraw vs. Bayard, 96 Ill. 146.

Bristol Goodson Elec. Lt. Co. vs. Bristol Gas El. Lt. and Power Co. 99 Penn. 371; 42 S. W. 19.

Com. Bldg. and Loan Assn. vs. Travette, 160 Ill. 390.

Hughes vs. McCasland, 122 Ill. App. 365.

Phillips vs. Gilbert, 2 McArthur (D. C.) 415.

Acker vs. Massman, 12 Ind. App. 696, 41 N. E. 77.

Spargo vs. Nelson, 10 Utah, 274; 37 Pac. 495.

Fifth. The franchises and rights of a *quasi*-public corporation, owing important duties to the public, and the property vested in it necessary for their use and enjoyment and the accomplishment of the purposes for which it was created, constitute an entirety, and in the absence of special statutory authority, are not subject to be seized and sold on execution, or for mechanics' liens.

Chicago & N. W. Ry. Co. vs. Forest County, 95 Wis. 89, 70 N. W. 77.

Chapman Valve Mfg. Co. vs. Oconto Water Co., 89 Wis. 264, 46 Am. St. Rep. 830.

Plymouth Ry. Co. vs. Colwell, 39 Pa. St. 337, 80 Am. Dec. 526.

Guest vs. Lower Marion Water Co., 142 Pa. St. 610, 12 L. R. A. 324.

Buncombe County vs. Tommey, 115 U. S. 122, 29 L. Ed. 305.

Pittsburg Testing Lab. vs. Milwaukee, etc. Co., 110 Wis. 624, 84 Am. St. Rep. 948.

People vs. Herkimer, 4 Cow. 348.

Foster vs. Fowler, 60 Pa. St. 27.

Susquehanna Canal Co. vs. Bonham, 3 W. & S. 27.

Dunn vs. No. Missouri R. R. Co., 24 Mo. 493.

Schulenberg vs. Memphis, etc. Co., 67 Mo. 442

Skranka vs. Rohan, 18 Mo. App. 340.

Ammant vs. New Alexandria & Pittsburg Turnpike, 13 Serg & Rawl, 210.

Elliott on Railroads, (2d Ed.) Sec. 1066.

Thompson on Corporations (2d Ed.) Sec. 3395.

20 *Am. & Eng. Ency. of Law* (2d Ed.) 296.

Phillips on Mechanics' Liens, Sections 180, 181.

Boisot on Mechanics' Liens, Sections 188, 209.

3 *Dillon, Municipal Corporations* (5th Ed.) Sec. 993.

(a) The terms "buildings, bridges, canals and other structures," used in a mechanics' lien statute, will not be construed to include *public* buildings, or *public* bridges, or *public* canals, or other public structures, or structures, buildings or improvements owned by *quasi*-public corporations and constituting an essential part of the plant or works required by such corporations to accomplish the purposes for which they were created, or to discharge their duties to the public, unless the statute unmistakably shows that such was clearly the intention of the Legislature.

Cases cited *supra,* and

First Nat. Bank vs. Malheur Co. 30 Ore. 420; 33 L. R. A. 141.

Bates vs. Santa Barbara Co., 90 Cal. 543.

Loring vs. Small, 50 Iowa 271, 32 Am. Rep. 136.

Sixth. Under the laws of the State of Idaho a purchaser of a water right from an irrigation company takes the same free and clear of all liens and encumbrances on the system.

Section 3292, Idaho Revised Codes.

Hewitt vs. Great Western Beet Sugar Co. 20 Idaho 235, 118 Pac. 296.

Seventh. Public contracts, in the nature of franchises, not let to the lowest bidder but involving personal confidence and a relation of trust, and coupled with liabilities and financial responsibility, are not assignable without the consent of the contracting parties.

Arkansas Valley Smelting Co. vs. Belden Min. Co. 127 U. S. 379, 32 L. Ed. 246.

Demarest vs. Dunton Lumber Co. 161 Fed. 264.

Boston Ice Co. vs. Potter, 123 Mass. 28, 25 Am. Rep. 9.

Winchester vs. Howard, 97 Mass. 303, 93 Am. Dec. 93.

(a) Contracts with the State of Idaho for the construction of irrigation works under the Carey Act involve financial responsibility and the relation of trust and personal confidence on the part of the contracting companies.

Idaho Revised Codes, Sections 1615, 1621.

Eighth. Under the laws of the State of Idaho, all real property sold at judicial sale is subject to redemption within one year from date of sale.

Sections 4520, 4490 and 4491, Idaho Revised Codes.

Hewitt vs. Walters, 21 Ida. 1, 119 Pac. 705.

Brown vs. Bryan, 6 Ida. 14, 51 Pac. 995.

Phillips vs. Hogart, 113 Cal. 552, 54 Am. St. Rep. 369, 45 Pac. 843.

Levy vs. Burkle (Cal.) 14 Pac. 564.

Fitch vs. Weatherbee, 110 Ill. 475.

Locey Cole Mines vs. Chicago W. and V. Cole Co. 131 Ill. 9, 8 L. R. A. 598, 22 N. E. 503.

Hollingsworth vs. Campbell, 28 Minn. 18, 8 N. W. 873.

Rhinehart vs. Stevenson, 23 Ill. 524.

DeWolf vs. Hayden, 24 Ill. 526.

Hall vs. Bond, 74 N. Y. Supp. 5.

McBee vs. McBee, 1 Heisk. (Tenn.) 558.

(a) The right of redemption is a rule of property and must be recognized by the courts of the United States, sitting in equity.

Brine vs. Hartford Fire Ins. Co. 96 U. S. 627; 24 L. Ed. 858.

Parker vs. Dacres, 130 U. S. 43, 32 L. Ed. 848.

Mason vs. Northwestern, Etc. Co. 106 U. S. 163; 27 L. Ed. 129.

Hammock vs. Farmers, Etc. Co. 105 U. S. 74; 26 L. Ed. 1111.

I.

Plaintiff Without Authority So Far Departed From the Terms of the Contract As to Make the Dam a Useless Structure and Resulted In Its Condemnation By the State.

A brief history of this dam is as follows:

Plaintiff Construction Company started this work upon the dam as well as on the canal system about June

15, 1909. At that time and during all the time while plaintiff continued its work, W. H. Rosecrans of the Arnold Company, engineers of this project, was the chief engineer of this construction work. This was conceded by everybody upon the trial. The learned judge of the District Court in his opinion herein reaches a different conclusion, but as we shall show hereafter there was never, prior to the final argument in this case in the District Court, any disagreement on that point; and if, as the learned judge of the District Court pertinently says, the interpretation given a contract by the parties to it while the work under it is in progress, is binding on the Court and upon all parties to the litigation, then we insist it is now too late to substitute another as chief engineer in place of Rosecrans.

From June, 1909, until November, H. G. Raschbacher was in the employ of the Arnold Company as resident engineer in charge of the inspectors both on the dam and the canal system. During that same period Goyne Drummond was under Raschbacher in part charge of the inspection on the canal system and Frank Coy was also under Raschbacher in the same relation to the dam. About November, 1909, Raschbacher was transferred by the Arnold Company to other work and Drummond succeeded him. About the same time Frank Coy, who, up to November, 1909, had been the inspector on the dam, and who had shown a disposition to compel complainant to adhere rather strictly to its contract, and who about that time had a few words with Mr. Corey, complainant's president, growing out of a threat by Coy to stop the work unless the Construction Company corrected a certain defect in the core-wall, *was superseded at the request of Corey*. (Rec. 385, 386-388, 390, 391, 435).

Up to the time Coy left the departures from the contract, so far as they concerned the work upon the dam, were of minor consequence when compared with those which occurred afterwards. After Corey had gotten rid of the obnoxious young engineer Coy, and after Raschbacher had been succeeded by the very friendly Drummond, Corey began a practice upon this dam which, alone and unaided by any other departures from the contract, was sufficient to render the dam a useless structure. This defect and departure from the contract was as follows:

The contract under which the dam was built provided that the material from the borrow pits might be dumped from trestles twenty-five feet high, provided these trestles were two in number only, one in the lower toe and the other in the upper toe of the dam, and both parallel with the core-wall, and provided all dumping should be done from these parallel trestles *toward the* core-wall. Opposing counsel in the court below contended that the contract gave the Construction Company the *privilege* of dumping always toward the core-wall from these trestles; but we submit that under the reading of the *two* paragraphs following the words "forming embankment," contained in the contract and appearing on page 514 of the printed record, the contractor was bound, if he used trestles, to dump always toward the core-wall; and this was the conclusion of the District Court (see Opinion, printed record top of p. 657). Now the Construction Company, instead of following that provision of the contract, built several trestles diagonally crossing the core-wall and about twenty-five feet high, and dumped progressively from those trestles, thus making diagonal fills across and ad-

jacent to the core-wall. The inevitable result of this work was to stratify the material and make a succession of blind drains through the dam from the upper toe to the lower toe, thereby destroying its imperviousness and rendering it fatally unsafe. The evidence is clear and undisputed that this method of construction must destroy the efficiency of the dam.

The style of construction provided by the contract for this dam was that it should contain a concrete core-wall in the center for a distance of about nine hundred feet, then the material from the gravel pits was to be dumped, as above stated, from twenty-five foot trestles, one in each toe of the dam, the dumping being toward the core-wall; then as the fill approached the center the material dumped from the tracks should be wetted or puddled as it was dumped, thus forming an impervious section in the center of the dam, extending its whole length and about sixty feet in width, thirty feet on either side of the core-wall.

An efficient dam must have not only sufficient weight to resist the thrust of the water, but also a sufficiently impervious section either at the upper face or in the center, to prevent percolation under the enormous weight of a filled reservoir (in this instance a depth of 110 feet). Now, the material taken from the borrow pits at this dam was of an ideal composition when properly handled by puddling; in other words, the material was gravel, containing all grades of fineness, from very coarse to powdered dust. The borrow pits were in the cone of Cedar Creek. The material from these pits if replaced in the dam with the exact uniformity with which it lay in the pits (which would, of course, be impossible), would scarcely be sufficiently impervious. If, however, it was dumped from tracks toward

the core-wall and as thus dumped the slope was wetted by a stream of water thrown thereon as the material was dumped, the finer particles would thereby be washed down toward and against the core-wall and the result would be that there would be an excess of fine particles in the section of the dam adjacent to and on either side of the core-wall, thus filling up all voids in the dump and making the center sufficiently impervious to hold water.

On the contrary, if no puddling at all were done, the result of dumping from a twenty-five foot trestle and then continuing to dump from a twenty-five foot fill when the space below the trestle had been filled up, would be that the large, coarse gravel (the coarsest consisting of stones as large as a man's head) would inevitably roll to the bottom of the dump and the finer would linger behind; that would, of course, make a stratified fill; and the stratum at the bottom, which would extend entirely through the dump from the upper to the lower toe, would consist of coarse rocks, forming a perfect drain instead of an impervious dam.

It is quite obvious that if the material should be dumped from a twenty-five foot trestle crossing a core-wall diagonally, it would be quite impossible to do any effective wetting or puddling; for there would be no place from which to take the fine material to be carried against and near to the core-wall. The large, coarse rocks would roll to the bottom and if a stream of water were thrown on that dumped material it would simply wash the fines from a small area adjacent to the core-wall near the top of the fill to another spot adjacent to the core-wall near the bottom of a fill. In other words, wetting or puddling such

a diagonal fill could accomplish nothing more than taking the fines from one place where they were required and putting them in another place where they were required; and still there would be a fatal deficiency in either place. The fine material could not be put into the fill adjacent to the core-wall.

In the borrow pits the material was found to be very uniform, that, is, the coarse and the fines were evenly mingled throughout. To dump from a trestle in the dam would inevitably separate the materials. It therefore became absolutely necessary, in case the contractor elected to use trestles, to so dump the material that that separation could be at least overcome by the puddling; otherwise the material when replaced in the dam, being then stratified instead of uniform, would be very much more pervious than it was as it lay in the borrow pit; and it is quite obvious that to dump this material into the dam from diagonal trestles crossing the core-wall would be to effect a separation and stratification, which could by no possibility be overcome except by the entire removal of the material; which would mean the rebuilding of the dam.

Opposing counsel in the court below, having no testimony whereby to contradict or impeach the testimony of Mr. Storrow and the other engineers who testified on behalf of these defendants, asked the Court to disregard the whole of Storrow's testimony, on the theory that the witness's statement to the effect that the expense of removing the central sixty feet of the dam and replacing the same by proper wetting and puddling would be so expensive as to be impracticable, was obviously and manifestly false. A little reflection will disclose the error of counsel. To remove a section of this dam throughout its whole length

and sixty feet wide at the bottom, would require the removal of a section more than two hundred feet wide at the top, allowing for the natural angle of repose of the material. Nor does this calculation consider the fact that to properly puddle the lower sixty feet in width the wetting must be begun before the fill reaches these sixty-foot lines. Therefore, to do as counsel suggests would be to again handle, not once, but twice, the majority of the material already composing this fill. This dumping from diagonal trestles was solely for the benefit, convenience and financial profit of the contractor and in no way benefited the owner. It came about in this way: Corey built his trestles so light that they would not sustain the weight of a loaded train of cars (see Corey's testimony, Rec. p. 443). There was no necessity for this method of construction, because complainant's chief witness, Drummond, admits that at one point the trestles were built heavy enough (see Rec. p. 148), Corey, therefore, in dumping from trestles made it a practice to dump always from the end car only; and as each car was dumped at the end of the fill the next car was shoved into position and there dumped, and so on until the whole train was dumped; thus always until the trestle was completely filled in, making the dumping at the end of the fill where the latter reached to the top of the trestle. Now, the gravel pits were all upstream from the core-wall. When Corey began to dump below the core-wall, in order to transport his material to that place, he had to cross the core-wall with the trestle. Instead of making the trestle heavy enough to support a loaded train, he built his trestle of light material, thus necessitating filling up underneath the trestle as he pro-

gressed; and thus he made these diagonal fills from trestles across the core-wall. This manifestly was for the benefit of Corey alone. Corey's witness, Drummond, after squirming very hard, finally admits that he did not like to acquiesce in the filling being done from diagonal tracks because he thought the other method was better; but practically says that he acquiesced because it was so much better for Corey (see Rec. p. 178).

The witness on whom the complainant chiefly and almost solely relied to prove the faithfulness with which it observed its contract was Goyne Drummond, who, during the entire progress of this work was in the employ of the Arnold Company, engineers for the Irrigation Company. Drummond is a resident of Wyoming. He went to work for the Arnold Company in the spring of 1909, surveying for this canal system. He was then put on as an inspecting engineer on the canal system under Raschbacher, who was subordinate to Rosecrans, the chief engineer of this work. In November of the same year Raschbacher was transferred and Drummond took his place. About that time Corey had gotten rid of Coy, the young engineer at the dam who had presumed to threaten to stop the work because Corey's foreman refused to follow the obviously proper directions of this young engineer (see Corey's testimony, Rec. 435; and Coy's testimony, Rec. 386-8). Coy had in other respects insisted upon a rather strict compliance by Corey with his contract (see Rec. 386-8). Drummond succeeded Raschbacher about the time that the obnoxious Coy was removed. Then things went differently. Deviations from the terms of the contract which had theretofore been prohibited were freely allowed (see Rec.

385-390). Corey gave Raschbacher a diamond ring (Rec. p. 432). About the time that Drummond was promoted to resident engineer, Corey presented him with some slight tokens of his esteem, such as a shotgun, a Thanksgiving turkey, a box of cigars and a bottle of whiskey, and some other delicacies (Rec. 243). Drummond, on the witness stand, cleared his own skirts to his own entire satisfaction by asserting that he virtuously stipulated with Corey that these courtesies were not to affect his, Drummond's, judgment, to which, of course, Corey agreed! Why he should have thought it necessary to so stipulate he does not explain.

Drummond came to Boise from Wyoming to testify, at Corey's request. For some days he was in daily and hourly communion with the Corey family regarding the case and his testimony (see Rec. p. 243). Drummond's testimony was employed not merely to show how the work was done, but he also qualified and testified in Corey's behalf as an expert in various lines—as an engineering expert, as an expert in land values and as an expert on irrigation schemes.

As a witness he showed much anxiety to do well by the Corey Company. He was asked by the latter's counsel if it was not true that the Corey Company had in all respects complied with its contract and he answered with marked alacrity that it had. On cross-examination he showed that statement to be sadly erroneous. On redirect examination he was asked if it were not true that all the deviations from the contract were committed for the benefit of the enterprise; and to this delicately suggestive question he gave his equally swift assent. On further cross-examination, however, he was again forced

to retract (see Rec. pp. 185). In his anxiety to be a good witness he was sometimes amusing; he parried questions for several pages relating to the validity of certain blue print maps (see Rec. 171), discovering to his own relief that there was no dynamite concealed in the question, he promptly changed his attitude. At other times for several pages at a time he parried questions which he considered embarrassing (see Rec. 180). He sometimes took several minutes to answer a simple question. As to the dumping from diagonal fills, Drummond, after considerable temporizing, was finally forced to admit that to have followed the contract would have been *"a little better, it is better, there is no question about that; the conditions were such I either had to stop them from work or else allow him to come in in this way"* (Rec. 178). Drummond and one of the Coreys tried to minimize the amount of dumping from diagonal trestles and placed it all the way from a few carloads to a thousand cubic yards. Defendants' witnesses, however, said there were about 2,000 yards in one spot, about 10,000 yards in another and above 40,000 yards altogether dumped from diagonal fills. *But the photographs speak louder than words.* In the face of this no testimony that had amounted to but one thousand or a few thousand cubic yards can be convincing.

The defendants produced as witnesses upon the construction work upon this dam and its effect upon the usefulness of the completed structure, Samuel Storrow, an engineer of large experience in irrigation and dam work, as well as other engineering enterprises, whose residence is in Los Angeles; Paul S. Roberts, an engineer who was State Carey Act Inspector while this work was in pro-

gress, and as a part of his duties in that position watched this dam, and reported the deviations from the contract, which resulted in the action of the State condemning the structure and stopping the work; James A. Green, an engineer of Chicago, with extensive experience in irrigation works in and about Idaho; W. F. Day, an engineer temporarily residing in Idaho; and George H. Binkley, who was at the time the work in question was in progress in the employ of the Arnold Company. All these were engineers of wide experience. Each one of these engineers had examined the dam in question and reached his individual conclusion upon its character without any thought of giving testimony in this case, but for a wholly different purpose; and the testimony of these engineers was sought and produced because of that fact, viz: that they gained their knowledge and reached their conclusions uninfluenced by any employment by any party to a lawsuit. The conclusion of each was that the Corey Company in constructing the dam so far departed from the contract that the dam was rendered useless for the purpose for which it was designed; and we have the admitted fact that the State of Idaho, because of the report of its own engineer (being one of the above witnesses) that the dam in question was so badly constructed as to be a menace to the lives of thousands of people and to valuable property, stopped all work upon the dam. This action too, was taken on the ground that the construction work on the dam vitally departed from the specifications approved by the State Engineer. *And in as much as these specifications were identical with those attached to and made a part of the Corey Company's contract, this finding by the State was a finding that the Corey Company had in vital parts*

departed from its contract with the Irrigation Company.

The testimony upon this point is as follows:

Samuel Storrow (Rec. 247), an engineer of Los Angeles, California, with large experience in the construction of dams, said that he examined this dam very thoroughly in June and July, 1911, his examination of the dam and canal system extending over nearly three weeks; that he found the material dumped from the trestles at various angles toward the core-wall and across the wall from various diagonal tracks, and that the dumping from one of these tracks alone amounted to several thousand cubic yards, and that the angle of these diagonal dumpings varied from forty-five to nearly ninety degrees; that the result was to lay a layer of coarse boulders along the bottom of the dump extending completely under the dam, making a blind drain; that this system of dumping also (not being always toward the core-wall) made a series of drains extending from this bottom blind drain through the body of the fill, thus enabling the water to saturate the whole fill; that this method of construction prevented imperviousness; that he took numerous photographs which were put in evidence, some of which showed the large coarse stones lying directly against and near to the core-wall; that in all places where the core-wall was exposed the material next to it was coarse, full of boulders, either not puddled at all, or puddled so slightly as to leave crevices, the voids near the core-wall being left unfilled; that there was very heavy leakage through the dam; that he found a large amount of material excavated from the tunnel in the cliff at the right end of the dam deposited in the dam and within a very few feet

of the core-wall; that it would be almost impossible to so puddle at that place as to make the fill there impervious; that the joints in the core-wall were not good; that there was sufficient fine material in the borrow pits so that if it had been handled as provided in the contract an impervious bank would have been formed against the core-wall; that the dumping from diagonal trestles crossing the core-wall at angles of from forty-five to ninety degrees made a fill that could not be rendered impervious by any amount of puddling; that the only way that an impervious bank of material against each side of the core-wall could be obtained would be to take the material all out and put it back again and that the expense of that would be prohibitive.

That to go on and complete this dam upon the structure already built to the height originally intended and to attempt to fill that dam with water to the height provided in the contract, would result in the saturation of the dam and percolation of the water through the dam, causing the lower side to slough off, making the angle flatter and flatter until a breach would occur and then the dam would all go out in a very short time.

He said this defect alone, viz., the diagonal fills, was sufficient to render the dam useless (Rec. 250, 254).

He also found that neither the core-wall nor the back filled trench went down to impervious material.

The witness also observed that the puddling was insufficient; that if the puddling has been sufficient the slope of the dumped material would lie, not at its natural angle of repose, but at a flatter angle; this flattening of the angle being caused by the stream of water. In this

dam, however, he found the various fills lying at the natural angle of repose.

The witness further says that the cost of making this dam an effective dam would be but a little less than the cost of building the whole structure upon the naked ground.

The witness also found that the spillway was constructed not as an open cut in the rock cliff, as provided in the plans and specifications, but as tunnels. This made a much less efficient spillway, because its capacity was less when clear and it was much more liable to being filled by debris. This change from the contract was, however, of some benefit to the Irrigation Company, because it lessened the expense.

The witness also found that the Antelope Creek crossing of the Blaine Canal was very different from the plans and specifications, was less efficient in providing against the danger of a flood, was much more likely to cause a wreck of the structure in case of a flood, and that the structure had actually been wrecked by a flood, the wreck being due, as witness believes, to this change from the plans and specifications.

The witness also found various other deviations from the plans and specifications in the construction of the concrete work, headgates, etc., on the canals. For the most of these changes the complainant showed subsequent blue print drawings delivered to him by some of the sub-engineers on the work. In most instances, however, it was not shown that the chief engineer had given his authority for or approval of these changes. It was shown that the changes in several instances lessened the effectiveness of

the structures and in two instances caused their wreck.

This witness made his examination under the employment of a Bondholders' Committee, the purpose and object of the examination being to ascertain whether with a given amount of available money the dam and the other structures could be so completed as to make an efficient system and accomplish the purpose of the enterprise. *On cross-examination he gave it as his opinion that if the plans and specifications has been followed an efficient dam would have resulted* (Rec. 263).

This witness, Storrow, as a part of his examination and tests dug three test pits, one about four feet above the core-wall and 191 feet to the left of the State spillway (this State spillway having been put in by the State subsequent to the time that Corey left the work), one four feet below the core-wall and about 174 feet to the left of the State spillway, and the third one some little distance above the core-wall and seventy-two feet from the State spillway. The imperviousness of this dam was attempted to be shown by complainant by testimony that in the month of June last those three test pits were dry, although the water in the reservoir was *guessed* to be slightly higher than the bottom of those test pits. It was not shown, however, that the hydraulic gradient was higher or as high as the bottom of those test pits. On the contrary, it was shown by the evidence of Storrow that when those pits were dug the water in the reservoir was materially higher than it was in June last (at which time a survey was made by Collins definitely locating the test pits, showing the elevation of their bottoms and the elevation of the water in the reservoir, and furnishing accurate information as to all

those points as against the highly inaccurate guesses of Corey and his witness, Henderson); that at that time when the test pits were dug they were intentionally dug just below the water line; that there was flowing water in them; that during the three weeks that Storrow was on the ground the water lowered and the test pits went dry, although the water in the reservoir was still higher than it was at the time Collins made his plat last June. In other words, the hydraulic gradient is not a straight line from the water level above the dam to the water level below the dam, but varies with the degree of density of the material in the dam; nor were any of these test pits within the lines extending from the reservoir to the stream below the dam. The more pervious the fill, the more steep the drop of the hydraulic gradient (see Storrow's affidavit, Rec. 152).

Opposing counsel in the court below exhibited much feeling toward Mr. Storrow and asked the Court to disregard his testimony—not that there is any substantial testimony in the record to contradict Mr. Storrow, but counsel claims that the witness' testimony bears inherent evidences of unreliability. One such instance we have already referred to and shown the error of counsel. In as much as this same attack upon Mr. Storrow will be made here (there being no other method of disputing his conclusions), we will add a word more in Mr. Storrow's behalf. Counsel claims that Mr. Storrow, having refused to exhibit his report to Mr. Riley, Chairman of the Bondholders' Committee, on the ground that it was a private communication made for a specific purpose unconnected with any issue in this case, that report if exhibited would have

discredited the witness' testimony. It would seem to be a sufficient reply to this charge that counsel for plaintiff, during the cross-examination of Storrow, succeeded in getting possession of a copy of Storrow's report to Mr. Riley, and read from it with more or less accuracy to the witness. That the witness correctly answered as to the contents of the report would seem to be the inevitable conclusion, from the fact that the cross-examining counsel *failed to submit the report to the witness, have it identified and then put it in evidence* (Rec. 349 to 353).

Paul S. Roberts, a civil engineer of seven years experience, who was State of Idaho Carey Act Inspector beginning April, 1910, was charged by the State Engineer with the duty of inspecting the work on this dam and irrigation system and reporting to his superior upon the compliance or non-compliance by the contractor with the provisions of the contract between the State and the Big Lost River Irrigation Company. This contract was first made between the State and Speer and by the latter transferred to the Irrigation Company. The contract referred to Schedule "A," which was said to be a description of the dam, reservoir and irrigation system. No document purporting to be Schedule "A" was attached to the Speer contract as it appears in the office of the State Engineer. It was shown, however, by the testimony of Hale that, under the custom in that office, no Schedule "A" was filed when a contract was made, but when the detailed plans and specifications were subsequently completed to the satisfaction of the State Engineer he put his approval thereon and they then became that part of the contract designated as Schedule "A" (Rec. 233, 244-247, 520). The

specifications filed in this instance subsequent to the Speer contract and as a part thereof were the identical specifications attached to the contract between the Irrigation Company and the Construction Company; therefore, when Roberts, Carey Act Inspector, was investigating and considering the question whether the work upon this dam was in compliance with the Speer contract, afterwards transferred to the Irrirgation Company, he was considering the question whether Corey was observing his contract with the Irrigation Company.

Roberts in his work was directed by his superior that as to any work completed during the incumbency of his predecessor he was to make no criticism except in case of clear necessity.

Roberts observed first that the contractor was dumping from trestles crossing diagonally the core-wall. So serious a departure did he consider this that he at once notified the State Engineer (Rec. 268). He also notified the engineer on the dam and requested that the work be discontinued. This work was discontinued for a few days, but subsequently resumed without permission from the State Engineer. Roberts estimated the yardage dumped from such diagonal trestle crossing the core-wall at something above ten thousand yards (Rec. 268). He took many photographs of the dam and other structures to illustrate his report. He found the core-wall leaking (Rec. 269). He found that the dumping from the diagonal trestles resulted in almost perfect separation of the material, the coarser to the bottom, making a very good passage for water. He also found that the puddling was insufficient, not materially affecting the natural angle of repose of the

dumped material. With a head of only a few feet of water in the reservoir, fifty second feet were gong through the dam (Rec. 271).

He found that the concrete that Corey was making, instead of being made from clean gravel taken from the river bed, was made from the gravel as it came from the dump, directly contrary to the specifications on file with the State and the specifications attached to Corey's contract. He found that the concrete foundation of the controlling works for the outlet tunnel was weak and insufficient and not based on rock as it should have been.

He found that under the trestle crossing the dam diagonally, the ground was not plowed as provided in the contract.

He took photographs showing that the coarse rocks from the borrow pits had in dumping rolled down adjacent to the core-wall (Abts. 111; Rec. 481).

He found that the rock excavated from the cliff was put in the body of the dam within twenty-five feet of the core-wall.

It was the opinion of Inspector Roberts that that method of dumping from diagonal trestles and the consequent drain through the dam, made the dam insufficient and unsafe, and he so reported to the State. *As a consequence, the State after a full investigation, stopped the work* (Rec. 271, 416). This was July 15th.

On June 3, 1910, when there was only a few feet of water in the reservoir, *the seepage from the dam amounted to fifty second feet* (Rec. 271). On July 6th, he requested that the dumping from the diagonal fill be stopped. It was resumed on the 14th without permission.

This, of course, was before the State ordered the work to be stopped.

On the 15th day of July, 1910, the State Land Board passed a resolution reciting that the Construction Company was not complying with its specifications in the contract with the State; had failed to comply with the numerous requests to correct the work, *and ordered the work to be stopped and that no further sale of water rights be made* (Rec. 416).

We call the Court's attention to the abstract of Roberts' testimony, both on direct and cross. It shows a careful and conscientious attention to his duties, and a careful consideration of the question of the safety of this dam before recommending that the work be stopped.

George H. Binckley, an engineer of twenty-five years experience, at one time connected with the Arnold Company, but not so connected at the time of his testimony, said (Rec. 344), that in August 5, 1910, when he went to the dam site to close the Arnold Company's offices, he met W. W. Corey; that he inquired of Corey why the water was going through the dam; that Corey explained that some of the excavation from the rock side had been deposited in the dam; that a concrete floor had been built over that to the portal of the tunnel and that the water could pass freely under the floor; also said that the toe wall at the bottom of the concrete facing had not been put in place in the old channel of the river. He further says that at various times he saw five second feet of water passing through the opening of the core-wall; he saw the water coming through the fill about three hundred feet in width above the core-wall; he dug a test pit for Mr. Robinson,

the State Engineer, in the body of the dam; he found the material not well mixed, that there would be a stratum of fine material and then a stratum of coarser material; that the water could flow freely through the stratum of coarse material; *that he saw a trestle built across the core-wall at an angle of about sixty degrees; that, in his opinion, it would be hazardous with the dam constructed in such manner to attempt to impound the full proposed head of water; that the result of such an attempt would probably be that the dam would go out* (Rec. 396). Witness gives it as his opinion that in order to impound the contemplated head of water, it would be necessary to dig a cut-off trench above the upper toe thirty to forty or fifty feet wide and fill it with puddled material such as clay, and very fine material, and then cover the upper facing with concrete or rip-rap; that if you attempted to fill the reservoir to the intended height without so doing, the dam would probably saturate and go out (Rec. 397); that you would have to have a blanket of fine material on the upper facing of the dam above the puddled trench, thirty feet thick at the bottom anyway; *that in his opinion as an engineer, this dam could have been built by strictly following the plans and specifications so as to make an impervious* and safe dam to hold *the required head of water* (Rec. 397. The word "not" is erroneously inserted in the printed record).

James A. Green, an engineer of Chicago, having in charge a large amount of engineering work in Idaho, examined this Mackay dam in September, 1910, at the request of the Farwell Trust Company of Chicago, representing certain proposed investors (Rec. 402). He spent the greater portion of a week at the dam site. He observed that *material had been dumped into the dam from trestles*

diagonally crossing the core-wall to the extent of approximately forty thousand or fifty thousand cubic yards; that the material lying next to the core-wall was generally coarse; voids not filled; the angle of dumped material was lying at the natural angle of repose; he saw about ten second feet of water flowing freely through the dam (Rec. 403. This water percolated through *six hundred feet of fill.* The elevation of the water in the reservoir was then but two to three feet above the water immediately above the core-wall; *that the effect of so dumping the material was to create a conical shaped dump, the coarser material rolling to the bottom;* that the material from the borrow pits was insufficiently puddled; that if properly puddled, this material was proper to make an impervious dam; *that his conclusion as to the cause of the water flowing through the dam was the stratification of the material caused by dumping from diagonal trestles, making it impossible to properly puddle.* (Rec. 404). He says it would be impossible to correct that defect except by re-building. (Rec. 404).

This witness also saw excavated rock from the top of the spillway placed within fifteen or twenty feet of the core-wall, dumped in piles. That portion of the dam could not be made impervious without removing or spreading the material; that this rock fill was partially covered with gravel. The witness gave it as his opinion that if this dam should be completed upon the structure already built, it would be unsafe to attempt to impound the intended head of water; that the flow of water through the structure would be such as to endanger the whole; that he would not advise attempting to impound one hundred and ten feet of water.

Witness further said that *if the dam had been constructed in strict accordance with the contract and specifications, it would, in his opinion, have made a safe dam to impound one hundred and ten feet of water* (Rec. 405).

W. F. Day (Rec. 411), an engineer of seven years experience, temporarily residing in Boise, spent eight days in the examination of the Mackay dam in September, 1910, while in the employ of James A. Green & Co., and probably for the purpose of Green's report to the Farwell Trust Company. He found the water at that time coming through the dam five and ten second feet; the water in the reservoir was only twelve feet higher than the water below the dam, and only 2.8 feet above the water immediately above the core-wall. He took levels at the time. He saw more than one fill open to observation made from tracks diagonally crossing the core-wall. He remembers three such diagonal tracks and there may have been others. In most places the material as it lay against the core-wall was coarse, voids not filled, and it was of such a character that water would flow through freely; the slope of the fill was the natural angle of repose, which condition is utterly inconsistent with sufficinct puddling; in which event the angle would have been flatter. Assuming that the dumping was from twenty-five-foot trestles and the puddling insufficient, the necessary result would be the coarse materials would roll to the bottom, making a pervious stratum; *that when the dumping is from tracks diagonally crossing the core-wall it is impossible to so puddle the material as to bring the fines against the core-wall. The only way the center could be made impervious is to remove the material and reconstruct the dam.*

The witness gives it as his professional opinion that if this dam should be completed upon the structure already built it would not be a safe or sufficient structure to impound one hundred and ten feet of water; doesn't think that much could be impounded, and to so attempt would be very hazardous. The witness further expresses the opinion *that if the Corey contract and specifications had been strictly followed, the dam would have been safe and sufficient to impound one hundred and ten feet of water.* He says that the material in the borrow pits was such that *by proper handling according to the contract and specifications, an impervious center would have been obtained.*

As against this impressive array of testimony, Goyne Drummond stands almost alone. We do not contend that he was willfully corrupt. We do contend that he was deplorably weak, and obviously under the influence of Corey. Enough has been shown, we think, to prove that on any disputed point his testimony should not be taken seriously.

Now it stands utterly undisputed in this record "that this dam as constructed is substantially wanting in efficiency for the purpose for which it was designed." The court below in its opinion said that this proposition "cannot be doubted" (Rec. 654). *That this dumping from diagonal trestles and fills was sufficient of itself* to cause this "substantial want in efficiency"—resulting in the action by the State of Idaho annulling the whole enterprise, is substantiated by the testimony of five engineers of undisputed standing, each of whom saw and examined this dam and reached his conclusion thereupon without

any reference whatsoever to this litigation. The State of Idaho acting independently, through its engineers, reached the same conclusion and acted thereupon. This is shown by the testimony of Roberts. The court below in its opinion said, referring to the specifications prescribing the manner in which this fill should be made if the contractor should elect to dump the material from trestles (Rec. 657): "Unquestionably to some extent the plaintiff deviated from the course thus prescribed." The lower court, however, after conceding the undisputed testimony as to this deviation, reaches the conclusion that *all the testimony as to the effect of that deviation is wrong* (Rec. 658), saying: "It may be conceded that if this method had been generally adopted in the construction of the dam its efficiency and strength may have been measurably impaired, but such construction was limited and exceptional and what was done was with the full knowledge and approbation of the chief representative *in the field** of Arnold and Company, if not of their managing engineer at Chicago." *But all the testimony in the record* as to the effect of this "limited and exceptional" departure from the specifications was, that it was sufficient to destroy the effectiveness of the dam. The learned judge of the District Court in determining to draw his own conclusions from the admitted facts at variance with the conclusions of all the engineers who testified, and in basing this variant conclusion on the "limited and exceptional" character of the fatally weak portions of the dam, overlooked the perfectly well known fact so forcibly impressed about once a year upon the

* Italics are ours.

dwellers along the levees of the great Mississippi, that a little leak (if it cannot be stopped) with appalling swiftness becomes a big one. Now the leaks through this dam could not be stopped. That is undisputed. And the testimony in this record is also undisputed, that the necessary and inevitable and invariable result of such leaks as this dam held, by reason of the blind drains formed by the diagonal fills, grow as time passes; *and that the rapidity of their growth is vastly accelerated by the increased head of water in the reservoir.* In other words, it was the invariable conclusion of all the experts that in view of the amount of leakage with the small head of water heretofore contained in that reservoir, an attempt to fill the reservoir to 110 feet, the head provided by the contract, would inevitably result in the dam going out. With the greatest respect for the court below, we urge that the conclusion of the learned judge was opposed to all the testimony and cannot be justified on the ground of common knowledge. All the witnesses say that a leak as extensive as this *through a fill* will enlarge until the fill is destroyed. That is also common knowledge.

The court below next finds (Rec. 659) that the specifications are defective in their provisions for wetting or puddling, and that therefore this leaky condition was due, not to the admitted failure of the Corey Company to observe its contract in what all the engineers and the State of Idaho hold to be a vital part, but to defects in the specifications. Here again the learned judge of the District Court reaches a conclusion directly opposed to the conclusions of all the witnesses who testified upon that subject. Mr. Storrow was the first witness who testi-

fied upon the subject, and he, *on cross-examination*, was asked whether if the specifications for the dam had been strictly followed by the contractor a good dam would have resulted, and he answered yes. The other engineers who followed him were asked this same question upon direct examination and gave the same answer, and their cross-examination failed to cast any cloud over the correctness of that conclusion (Rec. 252, 397, 405, 413). Was, then, the learned District Judge justified in disregarding all this unimpeached testimony from engineers whose standing and skill cannot be questioned, and substituting a different conclusion of his own?

In paragraph 8 of Specifications, under the heading "Details of Construction" (Rec. 514-515), it is provided that the central sixty feet of the dam shall be *puddled.* Storrow says that the object of puddling is to *fill the voids:* if it does not accomplish that it accomplishes nothing and can have no purpose. This puddling is done by throwing on a stream of water of such capacity as to carry the finer particles from a place where they are not needed to a place where they are needed, *thus filling the voids of the latter place and making it impervious.* The accuracy of this expert opinion is obvious. *It was recognized by Corey and even by Drummond.* (See Corey's testimony, Rec. 433-434; Drummond's cross-examination, Rec. 179). Corey says: "That was the object (of wetting) to wash it toward the core; *that was my understanding of what the contract required.*" "To wash out the fine particles down toward the center." "I understand the object of this puddling near the core-wall was to get *imperviousness there.*"

Again reverting to that pertinent suggestion of the court below that any doubtful provision of the contract is made clear by the understanding and interpretation placed upon it by the parties themselves during its execution, it would seem that little doubt remains that the parties to this contract both of whom were in the dam business, knew what was meant by "puddling", and knew that this contract meant that the central sixty feet of the dam should be puddled to the point of imperviousness to the head of water required to be held.

Now, the learned court below suggests that the plaintiff was not an expert dam builder; but, with all respect, we suggest that the records shows the contrary (see Corey's testimony, Rec. 197), and that the record also shows that by the contract the plaintiff undertook to supply expert services in that line. It provided (par. 2) that the contractors shall give "*competent attention* to the work and shall also keep a *thoroughly competent foreman* constantly upon the work." Other provisions of the contract are mentioned hereinafter which are confirmatory of our contention that the above language means (this being a dam contract) that the contractor shall be a competent dam builder and shall give the work the superintendence of a competent dam builder. Corey having had extensive experience in dam building did not hesitate to sign such a contract.

The learned judge of the District Court suggests that if plaintiff had insisted upon puddling the sixty-foot zone sufficiently to accomplish the only purpose of puddling, viz, imperviousness, and the Irrigation Company had objected to that puddling, and, on the ground of such objection, had refused to pay for it, the Corey Company might

find difficulty in collecting. If the Corey Company had insisted on doing proper puddling and the Irrigation Company had refused to allow it, a different question might arise. But, after all, this suggestion of the learned judge, instead of being an argument against the construction of the contract, for which we contend, is merely pointing out an unfortunate result of a contrary construction.

But the vital point of which the learned judge of the District Court, we think, lost sight, is this: *The undisputed evidence shows that the dumping in this dam from diagonal tracks crossing the core-wall rendered any amount of puddling insufficient;* and of itself was a sufficient departure from the contract to ruin the dam. There is no evidence that any defect in the dam was of sufficient extent to utterly ruin it, except the diagonal fills. The evidence is complete and uncontradicted that those diagonal fills were sufficient for that purpose.

The final conclusion of the learned Judge of the District Court is shown in the opinion (Rec. 660), as follows:

> "I am convinced that the vital defect in the dam is the absence of a bond between the superstructure and an impervious stratum underlying the bed of the reservoir, and that therefore it is of slight importance how the material in the earth embankment was deposited, or how much or how little puddling was done. While there may be very little direct evidence to this effect, from the testimony of the mortgagee's engineers, touching the practicability of rendering the dam serviceable, and from other features of the record, the inference is unavoidable that no alterations of or additions to the structure would avail, unless connection were in some way made with an impervious foundation, and the certainty whether such a bond is feasible makes it doubtful whether the structure is of any value at all."

It is true that the plaintiff Construction Company, directly in the teeth of the provisions of the contract, which are so plain as to require or permit of no interpretation, failed to bond the dam at all points with an impervious stratum underneath. *But, evidence that such failure was sufficiently extensive of itself to cause the failure of the dam is*, as the learned Judge intimates, lacking in this record. And we respectfully suggest that the issues here should be decided, not upon conjecture, but upon the weight of evidence. The core-wall was fissured and leaking. There is no evidence that the leakage through the dam passed through the bottom of the reservoir, thence into the ground below the depth of the bottom of the sheet piling, concrete wall and cut-off trench, thence horizontally six hundred feet through the uniformly mixed and unstratified bed on which the dam rested and then upward to the surface. Such a leakage as that would tend naturally to decrease with time on account of the silt setting in the bottom of the reservoir (Rec. 350). And we respectfully insist that the court below, in concluding that this failure to bond the foundation of the dam with an impervious stratum below it was the chief cause of the failure of the dam, is without substantial evidence in its support, and is, in the teeth of the practically undisputed testimony, that the *diagonal fills constituted the one variation from the terms of the contract, which of itself and unaided was sufficient to and did render the structure useless.*

But, was the Corey Company authorized to depart from the plain provisions of the contract in such a manner as the court suggests would render the dam a failure,

otherwise than with the written assent of the chief engineer; in other words, without a modification of the contract assented to by the Irrigation Company itself, or by its agent, pursuant to the authority vested by the contract in such agent?

The provisions of the contract itself relating to the foundation of the dam are explicit, requiring no interpretation. On the second page thereof (Rec. 485) it is said:

> "It being distinctly understood that wherever the specifications conflict with this agreement, the terms of this agreement shall govern; also that all work that may be called for in the specifications and not drawn on plans, or drawn on plans and not called for in the specifications, is to be executed and furnished as if described in both these ways."

In paragraph one, under the title: "Details of Construction," in the specifications, it is provided:

> "From the termination of the sheet piling a trench is to be dug through the layer of gravel and this trench back-filled with material, making a bond with the impervious material underlying the thin gravel layer at the higher elevation."

In paragraph five, under the same heading, it is provided:

> "In general these trenches will be excavated as shown on the plans, but the object in view is to excavate to and into the impervious stratum below the foundation of the dam, and such changes will be made as the work progresses as are found necessary."

It is true that the blue print sent from the Chicago office of the Arnold Company indicated a depth of six feet below the original surface for both the core-wall and the back-filled trench. The contract, however, plainly provided that where it and the plans were in conflict the contract should govern; and that where the specifications made a provision omitted from the plans, the specifica

tions should be followed. It was plainly impossible, moreover, to show upon the blue print prepared in Chicago, the exact depth of either the core-wall or the back-filled trench; that could be ascertained to a certainty only by the excavation upon the ground as the work progressed; even test pits or borings would be no certain test, for the composition of the underlying soil greatly varied. The blue print merely showed that the core-wall and the back-filled trench extended below the original surface of the ground. By measuring the line indicating the bottom of the trench and the core-wall, and comparing with the scale on the map a depth of six feet was indicated. That is the only way that a six-foot depth was shown. That fact, however, coupled with the impossibility of the Chicago office knowing where impervious material was to be found at the various points in the two thousand feet of length of this dam, and with the obvious and well-known fact that the depth of impervious material was not uniform throughout that two thousand feet, and the further fact that the contract plainly provided that the foundation should go to impervious material, should have indicated to any intelligent contractor that he should follow the contract, notwithstanding the blue print was uncertain in its meaning. It is also true that the young engineer, Coy, whom Corey subsequently got discharged, indicated upon his stakes a six-foot depth; but it is also clear that he, owing to his inexperience and youth, gave the blue print a different meaning than he would if he had properly considered it in connection with the contract and other circumstances. To the experienced engineer these plans did not indicate a six-foot depth (Rec. 408).

Here we beg to direct the Court's attention to the fact that the contract in this case (Plaintiff's Exhibit No. 23) is quite explicit. It placed burdens on the contractor which he could not shift. It provided (Paragraph 3) that the contractor shall give *"competent attention* to the work and shall also keep a *thoroughly competent foreman* constantly upon the work." This being a dam contract, the above language means, if it means anything, that the contractor shall be a competent dam builder and shall give the work the superintendence of a competent dam builder. As a matter of fact, Corey was an experienced dam builder and therefore did not hesitate to sign a contract with that provision.

The contract further provides (Paragraph 2) that: "Contractor shall provide all labor and material necessary for the *complete and substantial* execution of everything described or *reasonably implied* in the following specifications." It also provides in the preamble that the contractor shall build the dam and other works *"ready for operation of the irrigation system."*

It also provides (Paragraph 2) "all work that may be called for *in the specifications* and not drawn on the plans, or drawn on the plans and not called for in the specifications, is to be executed and furnished as if described in both ways; and *should any work or material which is not called for in the specifications and plans but which is nevertheless necessary for the proper carrying out of the obvious intentions thereof and of this contract, the same shall be deemed to be implied and required."*

The contract further provides (paragraph 8) that the

contractor guarantees all workmanship and material furnished by him to be *first class in every particular,* and agrees not to use any material, whether furnished by him or otherwise, known to him to be inferior or defective.

The specifications provide (paragraph 2, under "General") that: "Construction details are shown on the drawings accompanying these specifications, but if the contractor discovers that the drawings of the work will not provide satisfactory construction, it is *his duty to immediately stop the work* in question and notify the engineer in writing," etc.

It is also provided (paragraph 1, under "Materials and Workmanship") that: "All construction work of every class in connection with the work herein specified, shall be done in a workmanlike manner. All due attention shall be given to the relative sequence of the various parts of the work to the end that all parts of the work shall be constructed at such *relative times as are necessary to secure the greatest stability and permanence in the complete work when finished.*"

It is our contention that under this contract the contractor agreed that he was a competent dam builder; that he knew how to build a dam so it would subserve the purpose of its creation; that he agreed not only that he knew how to build a good dam, but that he would do so; that he was not warranted in departing from the plain terms of the contract, because some sub-engineer or inspector—not the chief engineer—authorized verbally (but not in writing), or tamely acquiesced in, such departures; that he was not authorized on the verbal permission or weak acquiescence of a sub-inspector whose good will had been

secured by gifts, to use methods in the construction work in the teeth of the contract, and which resulted, and which he should have known would result, in the interference of the State to protect the lives and property of its citizens.

We claim further, that under this contract Corey was not authorized to build such a dam as he did build, even if the methods used had not been in violation of the specific terms of the contract, and even if they had been acquiesced in by the chief engineer, since the methods adopted would necessarily result in the failure of the dam and such result was obviously and easily to be foreseen by a competent dam builder. But here these improper methods were forbidden by the contract; were not authorized in writing at all as provided by the contract; were not even known to the chief engineer; and were also in conflict with the *general duty of the contractor to construct a good dam.*

The Corey Company knew that this was a Carey Act enterprise (Rec. 201); it was chargeable with knowledge of the laws of the United States and of the State of Idaho governing the construction of irrigation systems under the Carey Act; it knew, or was chargeable with knowledge, that under the law the contract with the State Land Board lay at the foundation of the rights of all the parties; it must have known from the presence of and supervision by the representatives of the State Engineer, as well as from the terms of the law, that the work must proceed under the terms of the contract with the State Land Board, and under plans and specifications approved by it, otherwise the Irrigation Company's only source of income, namely: payment by the settlers upon their water rights

contracts, would fail. That is to say, it was chargeable with knowledge that under the law collections could only be made from the purchasers of the water rights, provided the dam and other irrigation works were constructed with strict regard to the requirements of the contract with the State Land Board. And, therefore, when he, an experienced dam builder, ventured to construct works substantially varying from the plans approved by the State Land Board and approved by the State Engineer, he knew he was furnishing a structure for which the Big Lost River Irrigation Company could receive no pay and which must certainly drive the Company into insolvency.

The Corey Company's position necessarily is that it, knowing what constituted a good dam; being under contract to build a good dam; knowing that the Irrigation Company would get nothing whatsoever for its vast expenditures, unless it built a good dam; knowing that the bondholders would receive no security for their money, unless a good dam was built, could build a poor and ineffective dam and then, relying only upon the weak acquiescence of a "friendly" engineer, could collect the contract price from the Irrigation Company, who could get no benefit from the structure.

But the vital fact which, as before stated, we think the learned Judge of the District Court failed to keep in mind was that the *evidence* is clear, and practically without dispute; that while the puddling did not comply with the intention of the contract as understood and construed by the parties at the time; and while there was a failure to bond the foundation of the dam with an impervious stratum below as clearly provided by the contract; and

while excavated rock from the tunnel was placed within fifteen feet of the core-wall, in piles, so as to interfere with proper puddling; yet there is no substantial evidence that any of these alone, or all of these together, did destroy the effectiveness of the dam; *while the evidence is clear and undisputed that the dumping from the diagonal tracks crossing the core-wall was sufficient to and did cause such leaks as to make the dam a useless structure and practically valueless.*

This proposition being clear, there remains to be considered the question whether the Corey Company is excusable for thus destroying the dam because of the knowledge and acquiescence of Drummond therein; in other words, whether the Irrigation Company was bound to accept a worthless structure because Drummond, without authority from it, meekly acquiesced in a plain departure from a provision of the contract which obviously had for its sole purpose the securing of a water-tight dam.

The learned Judge of the District Court meets this question by holding, first, that no order *in writing* was necessary to authorize a clear departure from the contract; and, second, that Drummond was the chief engineer of the enterprise. Let us see whether these conclusions are warranted by the record. In the specifications we find the following (Rec. 497-498).

> "No change from the designs as shown on the plans shall be allowed in the construction of any part of the work without written authority from the engineer. In case unforeseen difficulties in the construction work necessitate such changes, they will be authorized by the engineer, in writing, and the contractor shall then construct the work in accordance with the revised plans, and shall be paid for the same at the contract rates."

In this case the directions as to how the fill was to be made in case the contractor chose to dump from trestles were explicit and not subject to interpretation. "No unforeseen difficulties in the construction work" arose necessitating any change therefrom. The Corey Company by this change in the system of dumping was enabled to get the same money for less work. We submit, therefore, that not only was no departure from these clear terms of the contract allowable except by an order in writing, but also that a change in respect to the manner of dumping gravel was not permissible under a proper interpretation of the above provision of this contract, even with a written order.

Was Drummond the chief engineer? The contract says, under the title "Definition of Terms" (Rec. 484):

> *"The term 'engineer' is used to designate the consulting engineer, duly appointed and assigned by the company to have general charge of all work incidental to the construction of the company's project ready for operation."*

Can it be claimed that Drummond had "general charge of all the work incidental to the construction of the company's project ready for operation?" *An estimate was never paid without the signature of Rosecrans as chief engineer* (Rec. 162, 376, 379, 381). The plaintiff, in a letter signed by Corey as president of the Corey Company, *addressed Rosecrans as chief engineer* (Rec. 545).

Every one, apparently, who had anything to do with the project understood that Rosecrans was the chief engineer "in general charge of all work incidental to the construction of the company's project ready for operation."

Plaintiff's witness Drummond testified that Rosecrans was the chief engineer (Rec. 167, 173, 174, 176). Also Hurtt, president of the Irrigation Company (Rec. 158);

also Corey (Rec. 191, 193), Corey says this was the specific agreement, from the beginning. Also Spear (361); also Rosecrans (374); also Arnold (381); also Coy (386); also Wayman, plaintiff's witness (449). Little did Drummond suspect that he himself bore this dignity with which the learned Judge of the District Court clothes him. Corey himself, president of the Construction Company, so testified. Hurtt, the president of the Irrigation Company, so testified.

The blue print plans in evidence bore the signature of Rosecrans approving them as chief engineer. In fact, prior to the final argument of this case, it does not appear to have dawned upon the consciousness of any man that Drummond or any other person except Rosecrans was the chief engineer having "general charge of all work incidental to the construction of the Company's project ready for operation." If, as pertinently stated by the learned District Judge, an interpretation placed upon a contract by the parties to it at the time of its execution must bind them and the Court, we respectfully insist that it is now too late to invest Drummond with the dignity of chief engineer "having general charge of all work incidental to the construction of the Company's project ready for operation."

It being conceded then that this dumping from diagonal tracks was a plain violation of the contract, was not authorized in writing, was merely acquiesced in by Drummond, was not known to Rosecrans, the chief engineer, (that is his testimony, and it is undisputed, Rec. 379, 370, 149), was not even reported to him by Drummond when the State was threatening to close down the work on the

dam for that reason alone; and it being undisputed that the State, on account of this deviation, condemned the structure and forbade the further sale of water rights, thereby putting the Irrigation Company in a position where it was practically deprived of all corporate rights (Rec. 268, 271, 310, 416), is the Corey Company excused because of the weak acquiescence of the friendly Drummond, and is the Irrigation Company bound by such acquiescence to pay for the useless structure?

The provision in the contract that no change or deviation should be made from the provisions of the contract, except by written order of the chief engineer, was a reasonable and valid provision. It was a limitation upon the authority of the engineer when acting as the agent for the Irrigation Company, of which limitation the contractor had full notice. This agent could no more exceed his authority and thereby bind his principal than could any other agent. This provision of the contract was designed and well calculated to protect the owner against just such subserviency and complacency as that exhibited by Drummond. The authorities on this point are clear. See:

Carter vs. Root, (Neb.) 121 Northwestern, 952.

Langley vs. Rouss, 185 N. Y. 201.

Kelly vs. St. Michael's Roman Catholic Church, decided by N. Y. App. Div. January, 1912, reported at page 767 of May 11 issue of Law Reports and Session Laws.

Molloy vs. Village of Briar Cliff Manor, 145 App. Div. (N. Y.) 483.

Bannon vs. Jackson, 117 Southwestern (Tenn.) 504.

White vs. San Raphael R. R. Co. 58 Cal. 417.

Mishoud vs. McGregor, 61 Minn. 198.
Howard vs. Pensacola R. R. Co. 24 Fla. 560.

Moreover, as above stated, we contend that entirely aside from the question of written authority to vary from the terms of the contract in respect to the dumping from diagonal tracks, Drummond had no authority to consent to or acquiesce in such departure from the terms of the contract. The provision of the specifications quoted above relating to departures from the contract indicates that such deviations should be permitted only when made necessary by some insuperable difficuly. No such difficulty here existed. Drummond had no implied authority from his principal to consent to a damaging departure for the sole benefit of the Corey Company. See:

United States vs. Walsh, 115 Fed. 701 (Court of Appeals, Second Circuit).
Town of Sterling vs. Hurd, 98 Pac. 177 (Colo. 1908).
Ryan vs. Reservoir Co. 104 Pac. 221 (Utah 1909).

The contention has been made in this case that the payment of the monthly estimates by the Irrigation Company constituted an acquiescence in the departures from the terms of the contract by the Corey Company. The law is clearly the other way, as shown by the three cases last above cited, and the following:

Mercantile Trust Co. vs. Hensey, 205 U. S. 298.
Hartupee vs. Pittsburg, 97 Pa. St. 107.
Tharsis Sulphur and Copper Co. vs. McElroy, L. R. Eng. 3 App. Cas. 1040.

For the convenience of the Court we quote from the cases cited upon this point. The language of the various courts is pertinent herein, not only on the question of the effect to be given to progress certificates, but also upon the weight to be given to so-called acquiescence in departures from the plain terms of the contract:

In *U. S. vs. Walsh,* 115 Fed. 701 (Court of Appeals, Second Circuit), the Court said:

> "The contractors undertook to construct a dry dock according to the plans and specifications. The contract provided that the construction should conform in all respects to the specifications, and that there should be no change or modification of the specifications in any respect except upon the written order of the bureau of yards and docks. The authority of the engineer in charge was only that conferred by the contract and the contractors were informed by the instrument under which he exercised his authority of its extent and limitations. *If he had expressly consented to an unauthorized performance, his acts would not have bound the government. Much less is the government bound if he consented to an improper performance of the contract by neglect or mistake.* He had no power to authorize a departure from the requirements of the specifications, unless it was delegated by that clause which provides that the work is to be subject to his approval and inspection, and permits him to reject any materials or work which he may deem unsuitable. *That provision is one for the benefit of the government.* It is to be construed as an additional safeguard against non-compliance with the specifications by the contractors, and against a literal but unsatisfactory compliance."

In *Town of Sterling vs. Hurd,* 98 Pac. 177 (Colo. 1908), the Court said:

> "The error committed by the trial court was the result of assuming that the town, by taking the precautions it did under the provisions of the contract

to safeguard its interests, and employing an engineer with the authority thereby conferred, was precluded from litigating the question of the non-compliance of the plaintiff with his contract after the system was completed. *The acceptaance by the engineer or his acquiescence as the work progressed, if the evidence should establish this to be the case, could not be regarded as anything more than important evidential facts tending to prove that the work and materials complied* with the contract.

In *Ryan vs. Reservoir Co.* 104 Pac. 221 (Utah, 1909), the Court said:

"Nor is the fact that the person who it is contended represented the respondent in this case while the work of constructing the dam was in progress, made no objections, nor submitted any matters to the referee conclusive as against the respondent. No doubt the *fact that no objections were made while the work was being done was important, but it was at most only evidence more or less strong that the work and material were in* accordance with the provisions of the contract. This would also be so if the work had been accepted by the superintendent of respondent as claimed by appellant, since the contract nowhere provides that the superintendent should be the sole judge of whether the terms of the contract had been complied with, or that his acceptance of the dam should be conclusive upon that point, *but the contract in different clauses provides that the work shall be done in accordance with the* specifications stated in the contract, and under the *supervision of the superintendent of respondent.*"

Hartupee vs. Pitsburg, 97 Pa. St. 107, was an action for the price of engines supplied under contract. Plaintiff relied on monthly estimates and progress payments to show substantial performance. The Court said:

"His monthly estimates and certificates had reference only to the apparent value of the work done and not to the quality to him unknown of the iron used.

> In none of his reports does he refer to the quality of the metal in the castings or the wrought iron work. No certificate declares the materials were of the quality specified in the contract."

In *Tharsis Sulphur & Copper Co. vs. McElroy & Sons*, L. R. Eng. 3 App. Cas. 1040, action was brought for extras in supplying iron girders heavier than required by the contract. The contract provided that no alterations or additions should be made without written order of the engineers, and that no allegation by the contractors of knowledge of, or acquiescence in such alterations by the company, or their engineers, should be accepted as doing away with the necessity for such certificate. The contractor relied upon written estimates of the engineers, which included these girders at the heavier weight put in instead of as specified, on which estimates payments had been made. Held, no recovery, these estimates not being equivalent to written orders.

Lord Hatherly said:

> "Now, my Lords, the function of a certificate of this kind, which is not by any means an uncommon instrument, is this. The engineer of the Company is expected by the company to inform them whether they have sufficient value on their premises in the course of the execution of the contract, either in goods or material supplied, or in the cost of working up those materials to justify an advance. The certificate is not sent in as a bill for payment, there is no such bill at that time. The bill for payment is provided for in this agreement, as in most agreements of this kind which I have seen. The bill for payments is to be 25,000 pounds, when all the work is done, subject to deductions * * * But when the company want to know whether or not they are in a condition to make an advance, they ask the engineer," etc.

The departure from the provisions of the contract in

this case was of such a character as to defeat the lien. In certain cases where the departure from the contract has been slight and of such a character as to be fully compensated for by way of damages, the lien has been allowed for the amount of the contractor's claim, less the owner's damages. This, however, is not such a case. Here the structure is valueless (Rec. 256). The rule laid down in the American-English Encyclopedia of Law is as follows:

> "The doctrine of substantial compliance with building contracts does not apply when the omission or departures from the contract are intentional, and so substantial as not to be capable of a remedy, and an allowance out of the contract price would not give the owner substantially what he contracted for."

See:

Elliott vs. Caldwell, 43 Minn. 357.

Also, where the omission constitutes a structural defect of so essential a character that it cannot be remedied without partial reconstruction of the building, this rule does not apply. See:

Spence vs. Ham, 163 N. Y. 230.

> "Where the contractor fails to perform a considerable part of the work required under the contract, his failure, irrespective of whether his intention was good or bad, constitutes a bar to his enforcement of a lien for the work performed. If the defects are so numerous and prevailing as to show that the contractor did the job in a slovenly and improper manner, not conforming substantially with the plans and specifications, and if they are so essential as to defeat the intention of the parties to have the work done in a particular manner, the contractor, unless there has been a waiver, cannot enforce a lien."
>
> *Fox vs. Davidson*, 36 N. Y. App. Div. 159.

Glacius vs. Black, 50 N. Y. 145.

Anderson vs. Petercrt, 86 Hun (N. Y.) 600.

In *Bloom, Mechanic's Liens,* Sec. 342 and 343, the rule is stated as follows:

> "If there has been no wilful departure from its provisions, and no omission of any of its essential parts, and the contractor has in good faith performed all of its substantive terms, he will not be held to have forfeited his right to a recovery by reason of trivial defects or imperfections in the work performed. If the omission or imperfection is so slight that it cannot be regarded as an integral or substantive part of the original contract, and the other party can be compensated therefor, by a recoupment for damages, the contractor does not lose his right of action."
>
> "The owner has a right to have built the structure he contracted for, and not another. Even his caprices, if expressed in the contract, must be complied with, even though they would not have added to the value of the structure, or may have lessened its value. It is only when this plan has been substantially embodied in the work that the Court can have an occasion to estimate the deficiencies."

The California Supreme Court in *Perry vs. Quackenbush,* 38 Pac. 740, said:

> "Nor does the finding that the difference between the value of the house as actually constructed and as it should have been was only $350, tend to show that the contract had been substantially performed. That might have been true, though the structure were totally unlike the house contracted for. The owner has a right to have built the structure he contracted for, and not another. Even his caprices, if expressed in the contract, must be complied with, even though they would not have added to the value of the structure, or may have lessened its value. It is only when this plan has been substantially embodied in the work that the Court can have an occasion to estimate the dificiencies. The authorities are very clear upon this

point. There are a variety of cases to which the so-called modern equitable rule has been applied. *One is where the contractor fails to complete the structure.* In such case it is said, if the contractor has done or furnished anything of which the owner avails himself, such owner may be made to pay the value of it, after deducting all damages resulting from the failure of the contractor. In such case it has been sometimes said that it does not matter why the contractor failed to perform. Another case is where there is a defect which can be remedied. Here the contractor may recover the contract price, less damages caused by the failure, including costs of supplying the deficiency. Another case is where the contractor has endeavored, in good faith, to perform his contract, and has substantially performed, but there are some unimportant defects, arising through accident or inadvertence. Here, the defects not being such as defeat or materially change the design embodied in the contract, the contractor may recover, less damages occasioned by the failure. In such case there must be a substantial performance of every material covenant in the contract, and the failure must not have resulted from design or bad faith; and whether these facts exist is a matter to be determined by the jury, or the Court sitting as a jury. Substantial performance must be found."

In the case of *Schmidt vs. City of North Yakima,* 40 Pac. 790, the Supreme Court of Washington said:

"The plaintiff agreed to do the work strictly in accordance with the plans and specifications for the sum accepted. The testimony in this case plainly shows that the contractor insisted frequently upon supplying material different from that which was contracted for, and upon doing the work in a manner different from that which was specified in the contract. It is not sufficient for him to say that the material substituted is as good as that which was specified. The question of quality was determined by the contract. It must be presumed that all these questions had been in the minds of the contracting

parties, had been discussed by them, and that the kind of material which they concluded was best for the purpose was the kind which was specified. They had a right to have all such questions as that settled and determined before the contract was entered into. They were settled and determined by the contract, and the contractor has no right now to have the question of the relative worth of material litigated. It was for the very purpose of preventing the litigation on this question, and of preventing the subjection of their judgment to the judgment of a jury, that these specifications were made, and in this case, outside of any certificate of the engineer, the city would have the right to the kind of material for which they contracted, and to have the material placed in the sewer in the manner in which they contracted."

"The rule, even where the courts hold most strictly, is that where the contractor in good faith intended to comply with the terms of his contract, and has substantially done so, but there are some slight omissions or defects caused by inadvertence or mistake which are not so essential as to defeat the object of the parties, or, as it has been sometimes expressed, do not go to the root of the subject matter of the contract, but are easily susceptible of remedy, so that an allowance of the contract price will give the other party full indemnity, and give him in effect just what he bargained for, the contractor may recover the contract price, less the damages on account of such defects or omissions * * *."

Leeds vs. Little, 42 Minn. 414; 44 N. W. 309.

"If in an action at law the builder would be allowed to recover any sum after the abatement to the owner of his damages, for the non-completion of the contract, then in a suit in equity he would likewise recover. Justice is thus done to both parties. If the deficiencies are unimportant, and may be easily made up, the lien is still good."

West Va. Bldg. Co. vs. Saucer, 45 W. Va. 483; 31 S. E. 965.

"When the builder has in good faith intended to and has substantially complied with the contract, although there may be slight defects caused by inadvertence or unintentional omissions, he may recover the contract price, less the damage on account of such defects * * *"

"There must be no wilful or intentional departure, and the defects must not pervade the whole, or be so essential as that the object which the parties intended to accomplish, to have a specified amount of work performed in a particular manner, is not accomplished."

Phillips vs. Gallant, 62 N. Y. 256.

In another case a barn was constructed on contract, but the contractor did not construct it according to the specifications. The Court said:

"On examining the record and analyzing the evidence relating to the various items of omissions and defects in the work which are made the basis of the referee's findings that the plaintiffs failed to perform their contract, we see no reason for differing with him in the conclusion at which he reached * * * The referee was right in his view of the evidence upon the question of fact as to the performance of the contract. The defects pervade the whole work. They were very substantial, and not merely unimportant mistakes; and some of them, if not many, wilful and intentional departure or omissions from the contract. Under such circumstances the complaint was properly dismissed."

Smith vs. Ruggiero (N. Y.) 65 N. Y. S. 89.

In the case of *Hawke vs. Arundel Realty Co.* 98 Minn. 219, 108 N. W. 842, the Court said:

"When this formal defect (license to use vacuum system for circulating steam) is supplied, the contract will have been substantially performed. The case accordingly falls within the familiar rule entitling a building contractor to a mechanic's lien up-

on the substantial performance of his contract, and despite some slight omission or defects, which were not so essential as to defeat his claim, or, as it is sometimes said, do not go to the root of the subject-matter of the contract, but are easily susceptible of remedy."

"It is clear, upon the plaintiff's own evidence, that he did not substantially perform the contract. He admits that he left undone over one-twentieth of the work, consisting of numerous items. He did not overlook this work, but simply neglected it; * * *

The claim is made that the trustees and bondholders are in no position to raise this question of noncompliance; that it is purely a question between the contractor and the owner; and that if the owner, who has mortgaged this property for more than its present value, who is admittedly insolvent (Rec. 160, 228) and was insolvent during the time that practically all the alleged debt accrued (according to complainant's contention), who has no interest in defeating a lien, who has parted with all his interest in the property to these bondholders, sees fit to acquiesce in unjust and unconscionable demands by complainant, the bondholders, the real parties in interest, are powerless. Such, we believe, is not the law. See:

Eastmore vs. Bunkley, 113 Ga. 637.

Carson vs. White, 6 Gill (Md.), 17.

Adams vs. Central City Granite Brick Co. 154 Mich. 448.

Federal Trust Co. vs. Guigues, 76 N. J. Eq. 495.

Brown & Hoff vs. Cornwell, 108 Va. 129.

Knabb's Appeal, 10 Pa. St. 186.

Dunham vs. Woodworth, 158 Ill. App. 486.

Title Guaranty & Trust Co. vs. Burdette, 104 Md. 666.

Adams vs. Central City S. B. & B. Co. (Mich.) 117 N. W. 932.
Dittmer vs. Bath, 117 Mich. 571.
Thomas vs. Turner, 16 Md. 105.
McAdam vs. Bailey, 1 Phil. 297.
Inman vs. Henderson, (Ore.) 45 p. 300.
See 34 *Century Dig. Sec.* 450, *p.* 2634.

It is admitted by complainant that the Irrigation Company long before this suit was brought or this lien claim filed had parted with its entire interest in this property, to the extent that it had mortgaged the property for more than its value. Plainly, by all principles of equity, the Irrigation Company, after having so parted with its interest, ceased to have power to bind the successor in interest by admitting away the title to the property.

But, the Irrigation Company never has attempted to admit away its right. It never accepted this work (see affidavits of Rosecrans and Arnold and testimony of Hurtt, Rec. 148, 451, 452). The issuing of certificates, aside from a final certificate, is not an acceptance of the work. Moreover, the chief engineer, who alone had authority to issue the certificates, was not upon the ground and was ignorant of these gross violations of the contract by Corey and was kept in ignorance by the obliging (to Corey) Mr. Drummond. The evidence is clear that neither the officers nor the engineers of the Irrigation Company ever accepted this work. Not only did the Irrigation Company fail to take any affirmative action toward accepting Corey's work or waiving its right to reject or admitting away its property to Corey; but, on the contrary, the Irrigation Company, after the filing of

this bill, *filed its answer denying that Corey had performed his contract or is entitled to a lien.* Paragraph 9 of the answer reads as follows:

> "9. Further answering, denies that plaintiff has fully kept and performed its part of the agreement and contract referred to in bill of complaint, or has fully performed the labor and furnished the material required by it."

The last paragraph disputes complainant's claim to a lien and prays to be dismissed; *and the answer is sworn to by C. B. Hurtt, the President of the Company.*

The Irrigation Company, therefore, far from admitting away its rights or waiving any objection to Corey's work, or attempting to give away its property to Corey, has disputed his claim. It has thereby left the real parties in interest, the bondholders and their trustees, at liberty to fight the case on its merits and protect their property against the unjust demands of Corey, if the bondholders see fit to do so. If the Company had made a *bona fide* settlement with Corey a different question would arise, but it made no settlement with Corey, *bona fide* or otherwise. The least the Irrigation Company could, in good faith, do, was to refuse to accept the work or settle with Corey, or do anything toward prejudicing of the rights of its successors in interest after it became insolvent and had parted with all real interest. This it did.

The following are quotations from the authorities above cited as to the right of the Trustees to question the Corey Company's compliance with its contract. They are submitted to save the Court unnecessary labor.

In *Eastmore vs. Bunkley,* 113 Ga. 637, the Court said:

> "This was a petition by Eastmore against the New Cumberland Island Company to foreclose a contrac-

tor's lien for a sum alleged to be due for constructing and repairing a certain dam and dock or pier on Cumberland Island. No defense was filed by the company, but at the trial term, over the objection of the plaintiff, the Court allowed the executors of W. R. Bunkley to intervene and become parties defendant, on a petition in which they alleged that, as such executors, they held a mortgage on the realty against which the lien was sought to be established, which was for purchase money of the property and was a superior lien; that the defendant company was insolvent and the property insufficient in value to pay the mortgage debt; that the holders of the mortgage would have to pay the plaintiff's claim if his alleged lien should be established; that these petitioners were not apprised of the foreclosure proceedings at the first term, and had just been apprised of it for the first time; and *that the defendant company's failue to defend was due to its hope to impose a charge on the mortgaged property and thereby save itself from further* obligation to pay it, which was wrongful and fraudulent.

"As a logical conclusion of the ruling just made, we must treat the intervention as having been properly allowed by the court below; and it follows that the defendants in error, having come into court in a legal manner, are entitled to file their pleadings denying the plaintiff's allegations and setting forth their reasons why the relief prayed for in the petition should not be granted. The answer which the interveners filed was of this nature, and the motion to strike it was properly denied."

In *Carson vs. White*, 6 Gill (in Court of Appeals of Maryland), on page 23, the Court said:

"At January term, 1846, the appellee appeared in court and suggested that before the filing of the claim of lien, 4th July, 1844, the defendant mortgaged the said ground to him, and on the 5th of August, 1844 (before the filing of the said claim of lien by plaintiffs) the defendant applied for the benefit of the insolvent laws of Maryland, and the ap-

pellee suggested that he is 'the party in interest in the matter in this suit against said property,' and prayed the court to be permitted to defend the suit.

"The record states that the leave was granted and the appellee accordingly appeared to said suit by his counsel.

"A mortgage will afford very little security for the debt intended to be secured thereby if, after its execution the mortgagor could, by admissions, create liens on the mortgaged premises and thereby lessen, or it might be, destroy the value of the mortgage. The mortgagor can, by no acknowledgment subsequently to the mortgagee prejudice the interest of the mortgagee. The admission made in this case by the mortgagor ought not to have been admitted in the trial of those issues. * * *

"Why should not he be permitted to appear? This is a proceeding *in rem* and is designed to charge, with the claims of the appellant's property conveyed to the appelee, and the legal title to which we must assume was in him. Who was the proper person to appear and resist this claim, as a claim against the mortgagee's interest? It cannot be that the mortgagor was the only person to decide whether the claim should be resisted or admitted.

"It is suggested that John Carsons, Trustee, appointed upon his application of the insolvent laws, was the proper person, and no doubt he was a fit person to defend the equity of redemption which had been conveyed to him, if he thought it of any value; but it is equally clear that the appellee was not bound to abandon his title to the protection of the trustee, over whom he had no control, and who, by his acts, admissions and omissions, might prejudice the rights of the appellee. If the appellee, claiming the property as he did, could not defend the suit, surely the plaintiffs ought not to be permitted to obtain a judgment by which his interest was to be affected."

In *Adams vs. Central City Granite Co.* 154 Mich. 448, the Court said, p. 458:

"After the building was erected, and before this

claimant had filed notice of his lien, the owners mortgaged the property in question, and other property to the appellant. Dayton did not at any time render to the owner a statement under oath of the number and names of laborers in his employ, and of every person furnishing the materials. He was paid from time to time sums of money, the total of which nearly equals the original contract price. His contention here is ruled against him by *Kerr-Murray Mfg. Co. vs. Power Co.*, 124 Mich. 111, unless it can be said that, because Dayton paid his men weekly and had paid for all material furnished to the building, and because he had, before filing a lien, agreed with the owner upon the balance due him, remaining unpaid, the case is to be distinguished from the one referred to and is ruled by *Walker vs. Syms,* 118 Mich. 183, and *Bollin vs. Hooper,* 127 Mich. 287. Claimant is here asserting not merely a demand against the debtor, but a lien upon real estate in which others besides the owner claim an interest in it as lienors. *Wiltsie vs. Harvey,* 114 Mich. 131. The owner could not waive compliance with the statute so as to bind the mortgagee, appellant. *Dittmer vs. Bath,* 117 Mich. 571. The case is not within the rule, or exception, of *Walker vs. Syms,* or of*Bollin vs. Hooper.*

In *Dittmer vs. Bath,* 117 Mich. 571, the Court said, p. 572.

"We discover no evidence that the complainant had served upon the land owner Bath, a statement under oath of the number and names of the sub-contractors and laborers in his employ, and of those furnishing materials, and the amount due or to become due to them, and the decree indicates that there was no such testimony, as it contains a finding that the service of the same was waived by defendant Bath. The court held that the mortgage of the defendant Schenck was a prior encumbrance to complainant's lien, and the decree required the sale to be made subject to the mortgage, and costs were awarded to Schenck against the complainant, who has appealed. The briefs discuss but one point, viz., whether the failure to serve the notice required by Section 4, Act No. 179, was a

sufficient ground for the ruling of the Circuit Judge that the mortgage should have priority over the lien. We have held that a failure to comply with Section 4, Act No. 179, Acts 1891, is fatal to proceedings, to enforce a lien. *Wiltsie vs. Harvey*, 114 Mich. 131. This is upon the ground that compliance with such section by serving a sworn statement must be shown or at least waived, to warrant the commencement of an action or proceedings to enforce a lien. (Citing cases) Under Section 9 of the lien law * * * a lien terminates at the expiration of six months after the statement or account is filed with the Register of Deeds, unless proceedings to enforce the same are commenced within that time. In the case before us, there was no service of the statement within such period, and as the suit, brought before the expiration of the time, was prematurely brought, because of the non-performance of the condition precedent, the lien was at an end as to the defendant Schenck, who had a right to avail himself of any irregularity destructive to complainant's lien, as she was directly benefitted thereby. This was held in the case of *Wiltsie vs. Harvey, supra.* The alleged waiver was not made until March 30, 1896, and if this was effective to support the decree against the defendant Bath, which we do not find necessary to determine, as he has not appealed, it cannot have such effect against the defendant Schenck. The decree is affirmed with costs."

In *Federal Trust Co. vs. Guigues*, 76 N. J. Eq., a suit was brought to foreclose a mortgage dated May 27, 1907, and filed for record the following day. At the time the mortgage was made there was in course of construction a dwelling house, the contract price of which was upwards of $33,000, and toward the erection of which the four defendants claimed to have performed labor and furnished materials. The debts claimed by them, respectively, therefore, not having been paid, they filed lien claims under the provisions of the Mechanics' Lien Law against both con-

tractors, and in consequence were made parties defendant to the suit. The Court said, p. 498:

> "The building was commenced before the execution of the mortgage, and the situation is, therefore, such as that if the lien claims are valid under the provisions of the lien law, they have priority over the complainant's mortgage.
>
> "Two questions are raised by complainant against each of the lien claims. The first one concerns the validity of the claims under the lien law, and the second touches the size of the curtilage, and I will take up the claims *seriatim.*"

The Court then proceeds to pass upon the question of the lien claims, and the amount thereof, and renders judgment accordingly, the questions above mentioned being raised by the mortgagee only.

In the case of *Brown vs. Cornwell*, 108 Va. 129, the Court said (p. 130):

> "This is a suit in equity brought by appellants, as general contractors, to subject a dwelling house, the property of appellee Cornwell, to a mechanic's lien * * *
>
> "The appeal is from a decree of the Circuit Court, sustaining demurrers to the original and amended bills in the case.
>
> "The controlling question to be determined involves the sufficiency of the account filed by claimants and whether it constitutes a valid mechanics' lien under the statute.
>
> (Here follows the provisions of the Virginia Code relative thereto).
>
> "The account relied on in this instance altogether omits to show the prices charged for the items of which it is composed. Nor does it appear, either from the account or the accompanying statement, that the materials were contracted for at a gross sum, so as to bring the case within the influence of that line of decisions of which *Taylor vs. Netherwood* is a conspicuous type."

The Court then proceeds to discuss the question whether the account was sufficient, and holds that it was not. The Court further said (p. 132):

> "The assignments, that the demurrer to the original bill ought not to have been considered because it did not appear on whose behalf it was filed, and that there was no written demurrer to the anmeded bill, are not well taken. * * *
>
> "With respect to the other objection—that it does not appear on behalf of which defendant these demurrers were filed: There were only two defendants to the suit, namely, the owner of the building sought to be subjected, and the trustee in a deed of trust executed by the owner upon the property to secure a debt. It was competent for either defendant to resist the effort of the plaintiffs to fix a mechanics' lien upon the building, and the demurrer of either, if sustained, would defeat the lien and inure to the benefit of both, consequently plaintiffs could not have been prejudiced by the fact that the record does not disclose on behalf of which defendant the demurrers were interposed.
>
> "The distinction between defenses which are personal to one defendant and those which are common to all is well illustrated by the following authorities:
>
> "In *McCartney vs. Tyrer*, 94 Va. 198, this court said: 'The defense of the statute of limitations was not made by the debtor, the defendant company, but by * * * its principal creditor. The defense is generally a personal privilege and may be asserted or waived by a defendant at his election. *Clayton vs. Henley*, 33 Gratt. 72; and *Smith vs. Hutchinson*, 78 Va. 683. When, however, a court of equity has taken possession of the estate of the debtor for the purpose of distribution, and proceeded to ascertain the debts and encumbrances to enable it properly to administer and distribute the assets, an exception to the general rule is allowed, and any creditor interested in the fund is permitted to interpose the defense of the statute of limitations.'

The Court cites numerous authorities on that proposition.

> "So also, in *Cartinge vs. Raymond*, 4 *Leigh*, 626, it was held: 'Upon a bill in chancery by a distributee against an administrator and his surety, alleging that the administrator had not duly accounted, and praying an account, the bill is taken pro confesso as to the administrator, but the surety answers and proves that the plaintiff, on a full and final settlement, has released the administrator and so is not entitled to an account; upon which the chancellor dismisses the bill with costs as to both defendants. The bill was properly dismissed as to both defendants.'
>
> "Again in *Harisson et al. vs. Walker, Executor*, 95 Va. 721, the Court observes: 'We are of opinion that the Court did not err in sustaining the demurrer of the executor to the bill and dismissing the cause as to him. Neither did it err in dismissing it as to Mrs. Harrison, although she failed to appear and make defense. The defense of the executor, her co-defendant, was not personal to him. It went to the foundation of appellant's right to recover upon the case stated.'
>
> "So in the case at hand. The demurrers put in issue the existence of the mechanics' lien, and the dismissal of the original and amended bill as to both defendants was corollary to sustaining demurrers, no matter by which defendant they may have been interposed."

In *Knabbs Appeal*, 10 Pa. St. Rep. 186, the Court said (p. 192):

> "These views, in affirmance of the validity of the liens, make it unimportant to decide the other question made on the argument, namely, whether subsequent encumbrancers can be admitted to object deficiencies in the statement in avoidance of the lien. But upon this question we entertain no doubt. Until now their right to do so has never been questioned. It was permitted, without objection, in the much contested case of *Thomas vs. James*, 7 W. & S. 381; no one dreaming of a doubt. A claim filed is not in the nature of a judgment pronounced by a court. It is, as was decided at the present term, but a means,

partaking of the character of process, of enforcing a statutory lien. It comes not, therefore, within the principle upon which the doctrine of *Haner's Appeal*, 5 W. & S. 473, and other similar cases is based. This is proved by the whole scope of the Act of 1836, and particularly by the provisions of Sections 5, 9, 13, 23 and 25, which evidently contemplate and provide modes for the interference of mortgages, judgment creditors and other encumbrances, having no estate in the premises bound."

In *McAdam vs. Bailey*, 1 Phila. Rep. p. 297, the Court said:

"The simple question in this case is whether a person who holds a mortgage executed subsequently to the commencement of a building will be allowed to come in and make defense to a *scire facias* on a mechanics' claim. The *scire facias* is expressly directed to be served on the premises and as a *terra* tenant would be compelled by a judgment in proceedings, he may of course come in and claim to have defense. But is the mortgagee a terra tenant? He evidently, to the extent of his security, is liable to be cut out by mechanics' liens; he has an interest, and why should he not be heard? It has been said that so has any judgment creditor an interest to be affected. The difference between a judgment creditor and mortgagee is very plain. The latter has a title a jus in re as well as well as ad rem. For all purposes essential to the maintenance of the security, he is the legal owner. He is the purchaser within the statute, 27 Elizabeth, may recover possession by a judgment and have a writ of estrepement to stay waste. It is very plain that when an estate is encumbered much beyond its value, it may not be sufficiently important to the insolvent owner to induce him to spend time and money controverting particular claims. Very gross injustice might result if the mortgagee, who has as much advanced his money on the faith of this specific property as the man who may have taken an absolute title, could not be allowed to make defense in this case. We think the affidavit shows sufficient ground to justify us in referring this matter to a jury for decision."

In *Dunham vs. Woodworth,* 158 Ill. App. 486 (decided in November, 1910), the Court said:

> "Appellant, as executor of the estate of Dunham, deceased, filed a bill in equity to enforce a mechanics' lien and foreclose a mortgage against Lot No. 15 in Woodworth's addition to the city of Robinson.
>
> "It was averred in the bill that appellee, Woodworth, was the holder of a mortgage on the premises, the lien of which was inferior to and subject to the mortgage and mechanics' lien of appellant, and that the other defendants had, or claimed to have, claims for labor and material furnished against the premises. A cross-bill was filed by appellee Woodworth, and answers having been filed to the bill and cross-bill, the cause was heard by the court, who found the equities of the parties to be, that the mortgage of appellant was a first and prior lien, that the mortgage of appellee was next in priority, and that the claims for mechanics' liens of appellant and John W. Kessler were inferior to the mortgage liens. * * *
>
> "We have carefully examined the certificate of evidence to find whether the bill was filed within four months after the completion of the delivery of the material, but find no evidence as to when it was delivered. This lack of evidence is fatal to the bill so far as its effectiveness under Section 21 of the Statute is concerned. There is the same lack of any such evidence so far as the filing of the claim for lien is concerned. Before the lien could be enforced it must be shown by competent evidence that the claim for lien was filed or the bill filed to enforce the lien within four months after the final delivery of the material. This was imperative, and in the absence of such evidence no right to a lien against Woodworth was shown, and the decree of the court giving the Woodworth mortgage priority was right."

In *Title Co. vs. Burdette,* 104 Md. 666, Barnes on December 16, 1905, filed a bill in the Circuit Court against the Independent Methodist Church to enforce a mechanics' lien for work done by him on the building. The bill

was filed on behalf of Barnes and also for such other persons interested "herein" who may contribute thereto. On the same day the church filed its answer, consenting to a decree as prayed, and a decree was passed for sale.

On December 23, 1905, Barnes assigned his lien to Burdette, one of the appellees. On January 13, 1906, the Title Guarantee & Trust Co. filed a petition, alleging that it held a mortgage made February 3, 1905, against the Church building, none of the debt having been paid. The Court said, p. 675:

> "Jones and McCullough are not thus estopped, however. They denied the validity of plaintiff's claim when they first intervened by petition and were made parties defendant on May 3, 1906, but they failed to take any subsequent steps to support their attack upon this claim. It being admitted as correct by the answer of the church, such admission, for the purposes of the decree, was equivalent at least to primary proof. *Strike's Case, supra*, p. 70. Assuming, *ex gratia argumenti*, that this was only primary proof, they should have asked leave to take testimony, as they had ample opportunity to do, to sustain their attack upon plaintiff's claim, before audit was made. Primary proof stands in the place of full proof until full proof is demanded." (Citing cases).

In *Thomas vs. Turner and Yardley*, 16 Md. 105, *scire facias* was sued out under the mechanics' lien laws by appellees, on the 23d day of December, 1854, to enforce a claim for $690.10, filed on the 22d day of December, 1854, against two houses and lots in the City of Baltimore, for lumber furnished at different periods between May 10 and November 9, 1854, for the construction of the houses of Jacob E. Kridler, as the architect, builder and owner or reputed owner thereof. The Court said, on pages 110-111:

> "The record furnishes no evidence whatever that any fraud was perpetrated, or intended, by Kridler, in

the settlement made on the 18th day of September. It is proved that about the last of November following, he absconded from the City of Baltimore; but it nowhere appears that he contemplated such a step two months before, or that any of the causes then existed which afterwards induced him to run away and fly from justice. There is no evidence to impeach the bona fides of the settlement of the 18th of September, it was made in conformity with his long established course of dealing with the appellees. Nor is there any force in the other ground taken by appellees; the words of the Act expressly deny the lienor his remedy by scire facias, till the expiration of the credit and there is no reason why the defense should not be as available to any one whose property is sought to be charged as to the party with whom the contract is made. If materials are to be furnished to a builder or contractor on a credit, it could not be pretended that the claim could be enforced by scire facias against the property of the owner before the credit had expired. In the judgment of this Court, the eighth prayer of the appellant ought to be granted, which, upon the facts therein stated, denied to the appellees the right to recover in this proceeding any of the items in their lien claim filed which were included in the note and receipt given in evidence."

II.

Corey Brothers Construction Company made this Contract and Entered Upon This Work Without Complying With the Foreign Corporation Laws of the State of Idaho, the Contract Cannot be Enforced in any Court, State or Federal, and Appellee Is Not Entitled to a Mechanics' Lien Based on Such Contract and Work.

Corey Brothers Construction Company is a Utah corporation. This contract was made in Idaho with an Idaho

corporation in June, 1909. The contract provided for its being executed in Idaho and this appellee commenced work in Idaho about June 15th, 1909, and carried it on there. On August 5th, 1909, this appellee obtained a certificate of the Secretary of State (Rec. p. 537), that it was authorized to do business in the State of Idaho, having filed its articles of incorporation with the Secretary of State on that date and its designation of agent for the service of process (plaintiff's Exhibits 31 and 34). A copy of the articles had been filed with the County Recorder of Custer County shortly before (plaintiff's Exhibit 33). These are the facts relied upon to show the compliance of appellee with the Idaho law.

The Idaho Constitution, Article XI, Section 10, provides:

> "No foreign corporation shall do any business in this State without having one or more known places of business, and, an authorized agent or agents in the same, upon whom process may be served, and no company or corporation formed under the laws of any other country, State, or Territory, shall have or be allowed to exercise or enjoy, within this State any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of this State."

Section 2792 of the Revised Codes of Idaho provides in part as follows:

> "Every corporation not created under the laws of this State must, before doing business in this State, file with the county recorder of the county in this State in which is designated its principal place of business in this State, a copy of the articles of incorporation of said corporation, duly certified to by the Secretary of State of the State in which said corporation was organized, and a copy of such articles of incorporation duly certified by such county re-

corder, with the Secretary of State, paying to the latter the same fees as are provided by law to be paid for filing original articles of incorporation. Such corporation must also within three months from the time of commencement to do business in this State, designate some person in the county in which the principal place of business of such corporation in the State is conducted, upon whom process issued by authority of or under any law of this State, may be served, and within the time aforesaid must file such designation in the office of the Secretary of State, and in the office of the clerk of the District Court for such county, and a copy of such designation certified by either of said officers, must be evidence of such appointment. * * *

"No contract or agreement made, in the name of, or for the use or benefit of, such corporation prior to the making of such filings as first herein provided, can be sued upon or enforced in any court of this State by such corporation."

Then, after prescribing certain other penalties and denying such corporations the benefit of the statutes of limitations, the section continues:

"Provided, that foreign corporations complying with the provisions of this section shall have all the rights and privileges of like domestic corporations, including the right to exercise the right of eminent domain, and shall be subject to the laws of the State applicable to like domestic corporations." (Our italics.)

It is the testimony of Corey that the contract was made just before he started work. He started work about June 15th, which was about the date the Irrigation Company was incorporated. Just before that time the contract and specifications and plans were drawn up and agreed upon, to the last letter and figure, between complainant on the one hand and the promoters of the Big Lost River Irrigation Company, who then owned all the assets which

were, on the organization of the Company, turned over to it (Rec. p. 90). These promoters became the incorporators and then the directors and officers of the Company. The Company was organized for the very purpose of taking over the property owned by Speer *and the contract already made by complainant.* The Company on its organization elected directors, officers and an executive committee. These directors, officers and executive committee all knew from the time they were so chosen (and before) that Corey was proceeding with the work under this contract; and they conferred with him and recognized him and his contract. In other words, they ratified his contract, not on August 26th, when they authorized the signature, but promptly on the organization of the Company and long before the complainant attempted to secure a license to do business in Idaho. In other words, this contract of appellee became binding upon the Irrigation Company from the date of its organization, June 15th; and appellee worked under this contract from that date until August 5th before acquiring the right so to do (Rec. p. 165, 190, 191, 192, 226, 416). Corey says that the contract, even to the last letter and figure, was agreed upon before he went to work. The subsequent signing of the contract was not its beginning, but the creation of better evidence of its terms. Before June 15th it was drawn up, the signatures of the parties in typewriting appended, the date of the execution left blank and two blank lines left for the signatures of the officers. Corey Bros. Construction Company worked from June 15th to August 5th under this contract in defiance of the Idaho statute. *The allegations of the bill of complainant* (Rec. p. 7) are to the

effect that the contract between the Corey Brothers Construction Company and the Irrigation Company was in full force and effect on June 15th, 1909.

The facts above recited show clearly that at the time the contract was made upon which this action is based and the work begun under it, Corey Brothers Construction Company had not complied with the Constitution and statutes of Idaho as to foreign corporations, and the only question to be determined is as to the effect of such non-compliance when properly pleaded by defendants in an action brought in the Federal Court sitting in Idaho wherein the foreign corporation seeks the benefit of a mechanic's lien conferred by the Idaho statute. Appellants contend that this foreign corporation is no more entitled to sue upon this contract in the Federal Court than in the State Court and that it certainly is not entitled to a mechanic's lien based on such contract.

We are aware that the Federal Courts have held that under a New York statute somewhat similar, though not the same, as this Idaho statute, a foreign corporation, doing business in New York without having procured a license so to do, may sue in the Federal Courts, though denied the privilege of suing in the State Courts of New York. *This rule, however, is based squarely on the proposition that the court of last resort in New York has held that a contract so made in New York by a foreign corporation doing business there without a license, is valid and enforceable, except in the New York State courts.*

The Federal Courts have held, as indeed they must, that the construction placed upon this statute by the New York Court of Appeals is binding on the Federal Courts;

and the New York Courts, having held that such a contract is binding and enforceable, except in the New York State Courts, the duty of the Federal Courts is plain.

That, however, is not the situation here. The Idaho Statute and Constitution, as construed by the Idaho Supreme Court, has the same meaning as the Wisconsin Statute, considered in Diamond Glue Co. vs. United States Glue Co., 187 U. S. 611; also reported in 103 Fed. 838. That Wisconsin Statute said that such a contract by a non-complying corporation should be *void on its behalf but enforceable against it;* which of course, means that it is not void at all; but merely that while enforceable against the company it is unenforceable by it anywhere. That statute was upheld by the United States Supreme Court. The language of the Idaho Supreme Court gives to the Idaho statute precisely the same meaning.

The United States Supreme Court has firmly established the rule that the Federal Courts will follow the construction of the highest courts of the State in regard to the validity or enforceability of contracts made in violation of the foreign corporation laws.

Diamond Glue Co. vs. United States Glue Co., 187 U. S. 611; 47 L. Ed. 329.

Chattanooga Bldg. & Loan Assn. vs. Denson, 189 U. S. 408, 47 L. Ed. 871.

David Lupton's Sons Co. vs. Auto. Club, 225 U. S. 489, 56 L. Ed. 1177.

An examination of the Idaho cases on the subject discloses that such contracts are declared to be unlawful and void when sued upon by the offending corporation, although the defendant may waive the objection by failure

to plead it, but that the contract may be enforced as against the foreign corporation and its invalidity does not entitle a party dealing with the corporation to affirmative relief because of such invalidity.

The first case construing this section was *Katz vs. Herrick,* 12 Idaho 1; 86 Pac. 873. This was an action on a note made to a foreign corporation which had not complied with the statute when the note was made, although it did comply subsequently. The plaintiff was an endorsee with notice. The Court held the provision of the constitution self-executing, that the statute was mandatory and that the plaintiff could not recover. The Court said with reference to the section of the Idaho constitution quoted above:

> "It will be seen that in the very inception of our existence as a State the framers of the constitution provided that no foreign corporation shall do any business in this state without having first authorized a legal agent in this state upon whom process may be served, and also having established a known place of business. *This provision of the constitution is self-acting,* and self-operative to the extent that it requires the facts therein enumerated to actually exist at the time such corporation begins to transact business within the state. The constitution, however, failed to require the corporation to furnish evidence of such facts and make the same a matter of record within any designated office or offices. The legislature, nevertheless, in the exercise of its undoubted power and authority, enacted Section 2653 and thereby pointed out the specific acts and things necessary to be done by any foreign corporation in compliance with the constitution and statutory provisions, and in order to entitle it to do business within this state. The people, in adopting Section 10 of Article 11 of the Constitution clearly announced and proclaimed the policy of the State toward foreign corporations, and have said in unmistakable language that such

artificial beings existing only by the will of a foreign state, *must subject themselves to the jurisdiction and the law of this state before they can have any recognition or legal existence within its borders.*" (page 16). * * *

"It will be seen that the Constitution requires that a corporation shall have an authorized agent and a known place of business before transacting any business within the State. The statute says that '*before* doing business in this state' a foreign corporation *must* comply with the statute, etc. *It also provides that no contract or agreement can be enforced by any corporation that has failed to comply with the statute. This language seems to us to clearly indicate both the intention of the framers of the constitution and of the legislature to prohibit any transaction of business until the statute has been complied with. The purpose and spirit of these provisions indicate a clear intent to make such contracts unlawful.* It would hardly be consonant with the duties of the courts and the office of the judicial department of the State to uphold and enforce contracts at the instance and on the application of corporations or individuals that have transacted business in the manner and under conditions which both the framers of the Constitution and the legislative department of the State have said shall be unlawful. The courts are established for the purpose of upholding and enforcing the Constitution and laws of the State, and when once they have arrived at the purpose and intent of the law-making department, it is their duty to enter such judgment and decrees as will render effective that intent. *The corporations that have transacted business without observing the legal requirements, and also their assignees with notice, are therefore left without a remedy for the enforcement of such contracts.* (Pages 17 and 18). (Our italics).

Agan, in the same case on rehearing, the court used this language:

"We take it that when the framers of the Constitution said that 'No foreign corporation shall do any

business in this State without having one or more known places of business and an authorized agent,' etc., and the people adopted it into their organic law, that they meant exactly what the clear and unmistakable language employed implies. We cannot understand how such language can require construction or interpretation. It carries with it on its face its own construction and meaning."

On page 18 the Court also quotes with approval from *Clark and Marshall on Private Corporations* at Sec. 847-B of Vol. 3, as follows:

> "Most of the courts hold that the object of the statute is to prohibit foreign corporations on grounds of public policy, from doing any business in the State until they have complied with all the conditions precedent prescribed by the statute; that this prohibition is absolute, and *renders illegal* contracts made by a foreign corporation in the State in violation of the statute, and that since the contract is thus illegal, the corporation *cannot maintain an action to enforce the same.*"

The Court also quotes with approval from the opinion of Justice Walker in *Cincinnati Mutual Health Assurance Co. vs. Rosenthal*, 55 Ill. 85:

> "When the Legislature prohibits an act, or declares that it shall be unlawful to perform it, every rule of interpretation must say that the Legislature intended to interpose its power to prevent the act, and, as one of the means of its prevention, *that the courts shall hold it void.* This is as manifest as if the statute had declared *that it should be void.* * * * To permit such contracts to be enforced, if not offering a premium to violate a law, it certainly withdraws a large portion of the fear that deters men from defying the lay. To do so places the person who violates the law on an equal footing with those who strictly observe its requirements. That this contract is absolutely void as to appellee we entertain no doubt."

The Court also said (p. 28):

> "We fail to see any greater evil in allowing a citi-

zen to interpose as a defense the fact that a foreign corporation has failed to comply with the constitution and statute in appointing an agent and establishing a known place of business, than there is in allowing such companies to come into the state and prey upon its citizens in total disregard of the law and say that such contracts are binding and enforceable. We have never held, and never intended so to do, that such contracts are entirely and absolutely void. On the contrary, we intimated in the original opinion that *they are enforceable on the side of the party with whom they have assumed to contract.* We did say, however, that *the corporation should be without any remedy in the courts* on an action to enforce contracts made by them while in default of compliance with the requirements of law. The evil does not exist so much in the contract as in *the legal existence of one of the contracting parties.*

"They come into the state, transact business in some capacity, but refuse to comply with the laws of the state that gives them a standing within its jurisdiction as corporations. They do business, *therefore, without name, identity or legal existence.*"

The case of *Valley Lumber Company vs Driessel*, 13 Idaho, 662; 93 Pac. 765, discussed the subject fully, although the case was decided solely on a question of pleading. The Court distinguishes three lines of cases on this subject:

First. States like California, which hold that the right of action is merely suspended until compliance, and, therefore, non-compliance must be pleaded as an affirmative defense.

Second. States which hold that such contracts are void and compliance is a condition precedent to the cause of action and must be pleaded by plaintiff.

Third. States where non-compliance will not be presumed and the defendant waives the objection unless he

puts the fact of compliance in issue by demurrer or answer.

The Idaho Court took this third or intermediate position, which differs from the second only in the matter of pleading. Under the second view a complaint is open to general demurrer where it fails to allege compliance and in the latter case it is open to special demurrer for want of capacity to sue. In the former case as the defect goes to the cause of action it can be raised even on appeal, while in the latter case as the Idaho Court held in the Driessel case, it cannot be so raised. In neither case are contracts absolutely void because they can always be enforced against the foreign corporation, so in the Driesell case the Court said, referring to *Katz vs. Herrick, supra*:

> "The Court there held that the non-complying foreign corporation had no legal existence in this State *and under the law was without a remedy for the enforcement of any contract made by it within the State,* but did not hold that its contracts were absolutely void."

In the later case of *War Eagle Mining Company vs. Dickie*, 14 Idaho 534; 94 Pac. 1034, the Court said:

> "*In limine* it is proper to announce that our further consideration, since deciding the case of *Katz vs. Herrick*, of Section 10, Article 11, of the Constitution, and of our legislative enactment in accordance therewith, have all tended to reinforce the conviction that the principles announced in that case are correct and sound and we have no inclination whatever to depart from them in any respect."

This statement effectually disposes of any contention that the Court qualified its decision in the *Katz vs. Herrick* case by the decision in *Valley Lumber Co. vs. Driessel.*

The later decision of *Tarr vs. Western Loan & Savings Co.* 15 Idaho 741; 99 Pac. 1049, shows clearly the construction put upon such contracts by the Idaho Supreme Court. Here plaintiff brought suit for the cancellation of a mortgage on the ground that it was executed in favor of a foreign corporation which had not complied with the statute, and, therefore, was null and void. The foreign corporation filed its answer and a cross-complaint for the foreclosure of the mortgage. Plaintiff answered the cross-complaint setting up defendant's non-compliance. The lower court granted judgment for foreclosure. On appeal this decision was reversed, the Court holding that the statute was mandatory and that a compliance after the contract was made, but long before suit was brought, could not avail the corporation. The Court also held that paying interest to the corporation could not estop the plaintiff to plead non-compliance. On the other hand, the Court indicated that plaintiff who had received a benefit under the contract, was not entitled to affirmative relief by cancellation.

We submit that these cases have construed the Idaho Constitution and Statute to mean that contracts entered into by non-complying foreign corporations are invalid and unenforceable in suits brought by it or its assignees with notice, but such contracts may be enforced against it.

We are not unmindful that the learned judge of the District Court who wrote the opinion in the case at bar, in the case of *Colby vs. Cleaver*, 169 Fed. 206, held that a foreign corporation, which had not complied with Section 2653 of the Idaho Statutes, might sue in the Federal Court. We respectfully submit, however, first, that the Court therein misconstrued the holdings of the Idaho Supreme Court on

this Statute. As we read the Idaho decisions, they hold *such a contract as being unenforceable by the corporation. anywhere.* If that is true it must follow that it could not be enforced in the Federal Court, not because the statute says that the contract cannot be enforced in the Federal Court, for perhaps the State has no right to limit the jurisdiction of the Federal Court, *but because that statute, as construed by the Idaho Supreme Court, fixes the status of such a contract as being unenforecable by the corporation.*

But in the case of *Hill vs. Empire State-Idaho M. & D. Co.*, 156 Fed. 797, the same learned judge said, with reference to the identical statute:

> "Thereupon it is provided that contracts and deeds made or taken by such corporation while in default shall be void, and other penalties are prescribed."

But again: the right of the plaintiff to claim a mechanic's lien, if any, rests upon Section 5110 of the Idaho Revised Code, which, among other things, provides:

> "Every person performing labor upon or furnishing material to be used in the construction, etc., has a lien upon the same for the work or labor done or material furnished," etc.

In the light of the language above quoted from *Katz vs. Herrick*, construing and interpreting the provision of the Constitution of Idaho, can it be said that a foreign corporation is within the meaning of the word "person" as found in Section 5110 of the Idaho Revised Code? Can it be said that a corporation which has no legal existence within a State is entitled to statutory rights conferred by the State?

We think it clear that a non-complying foreign corporation is not a "person" within the meaning of such a law.

Philadelphia Fire Association vs. New York, 119 U. S. 110.

Pembina vs. Pennsylvania, 125 U. S. 181.

The above cases do not have reference to statutes giving the right to a mechanic's lien, but they do in principle hold that a foreign corporation is not entitled to the protection accorded to a corporation which has complied with the laws of the State.

We submit that when due consideration is given to the language of the Constitution of the State of Idaho, as above pointed out (and this provision of the Constitution does not seem to have been considered by the Court in *Colby vs. Cleaver, supra*), no lien can be established in favor of the plaintiff on a contract entered into, as alleged in the complaint, prior to the time when the complainant attempted to comply with the Constitution and the statute of Idaho.

But the Idaho Statute is perfectly clear on this point. Section 2792 has already been quoted so far as pertinent to the facts in this case. The first paragraph of the section enumerates the acts required as a compliance and the second paragraph provides several penalties for non-compliance. Then after providing that non-complying foreign corporations are not entitled to the benefit of the statutes of limitations the section closes with the following proviso:

> "Provided, That foreign corporations complying with the provisions of this section shall have all the rights and privileges of like domestic corporations, including the right to exercise the right of eminent domain, and shall be subject to the laws of the State applicable to like domestic corporations."

This proviso is an affirmative grant to such foreign cor-

porations as comply with the Idaho statute, of the rights and privileges of domestic corporations. It doubtless was intended to apply to all the rights and privileges of corporations, common law and statutory, but it must certainly apply to rights such as the right to a mechanics' lien, which is purely a creature of statute; otherwise, the proviso is wholly without meaning.

Here we have this question presented. A citizen of Utah goes into the Federal Court in Idaho, not for the purpose of establishing his rights under the common law, or of establishing any rights arising under general law as administered by courts of equity, *but for the purpose of enforcing a right claimed under an Idaho statute.* Will the Federal Court in such suit, based on an Idaho statute, give him rights which he could not get in an Idaho court? If so, the situation is anomalous indeed.

The Federal Court will, of course, enforce Idaho laws when its jurisdiction is properly invoked. That is to say the Federal Court, sitting in Idaho, will enforce Idaho laws or statutes when passing upon a contract to which Idaho laws or statutes apply; just the same as a Federal Court, sitting in Idaho, would enforce California laws or statutes when passing upon a contract to which California laws or statutes apply. But, it is a novel spectacle, indeed, we respectfully submit, to observe a complainant invoking in a Federal Court anywhere, the laws or statutes of any State, and in the same breath asking the Court to give him relief *based upon those State laws or statutes, which the courts of that State would deny him.*

We wish to review briefly the holdings of the Federal Courts upon foreign corporation statutes which are sub-

stantially similar to the Idaho statute, because we think they are conclusive of this question and of this entire case as far as Corey Brothers Construction Company is concerned.

The Wisconsin statute has been referred to *supra*. In construing that statute in the case of *Diamond Glue Co. vs. U. S. Glue Co.* 103 Fed. 838, the Court said, at page 839:

> "Dependent upon assent of the State, express or implied, it is clear that the assent may be granted upon such terms as the Legislature may impose (*Paul vs. Virginia, supra*), and that an enactment within the power of the State which prohibits the transaction of business therein by foreign corporations except upon compliance with certain conditions *invalidates any contract entered into in violation of the statute*, so that the contract cannot be enforced in any Court administering the law in such State (*Manufacturing Co. vs. Ferguson,* 113 U. S. 727, 733; 5 Sup. Ct. 739, 28 L. Ed. 1137, and cases cited). *Where the prohibition is plain, this rule governs equally with or without express terms in the statute declaring the invalidity of the contract.*" (Citing cases).

This decision was affirmed in 187 U. S. 611, the Court holding that it was bound to enforce the Wisconsin statute as construed by the Wisconsin courts.

In *Cooper Mfg. Co. vs. Ferguson,* 113 U. S. 727, the Court said:

> "It must be conceded that if the contract on which the suit was brought was made in violation of the laws of the State, *it cannot be enforced in any Court sitting in that State charged with the enforcement of its laws.*"

The Alabama Constitution, Article 14, Section 4, provides:

> "No foreign corporation shall do any business in

> this State without having at least one known place of business, and an authorized agent or agents therein; and such corporation may be sued in any county where it does business by service of process upon an agent anywhere in this State."

This is substantially the same as the Idaho Constitution. The statutes enacted to carry out this provision also closely resemble the Idaho statute, and have been clearly construed by the State and Federal Courts.

Sections 3642 and 3643 of the Alabama Code of 1907 (Sections 1316 and 1317 of the 1896 Code) provide for the filing of a written designation of agent. Section 3644 (formerly 1318) provides:

> "It is unlawful for any foreign corporation to engage in or transact any business in this State before filing the written statement provided for in the two preceding sections."

Sections 3647 and 3648 (formerly 1321 and 1322) provide for a franchise tax upon foreign corporations, and Section 3649 (formerly 1323) provides that:

> "All contracts made in this State by any foreign corporation which has not complied with the provisions of the two preceding sections, shall at the option of the other party to the contract, be wholly void."

The Idaho statute as construed by its Supreme Court reaches exactly the result prescribed by the provision last quoted, but the courts in construing the Alabama statute have paid but little attention to this provision.

In *Chattanooga Bldg. & Loan Assn. vs. Denson,* 189 U. S. 408; 47 L. Ed. 870, the question of the enforceability of such a contract in the Federal Court was squarely raised and both the Circuit Court of Appeals and the Supreme Court held that the foreign corporation could not recover.

(See 107 Fed. 777). The Supreme Court, after referring to a number of Alabama cases, said at page 413:

> *"These cases constitute an interpretation of the Constitution and statutory provisions and clearly hold that any act in the exercise of corporate functions is forbidden to a foreign corporation which has not complied with the Constitution and Statutes and that the contracts hence resulting are illegal and cannot be enforced in the courts."*

Two more recent cases on the Alabama law are: *In re Conecuh Lumber Co.,* 180 Fed. 249, and *Thomas vs. Birmingham Ry. L. & P. Co.* 195 Fed. 340.

In the latter case, in holding that the foreign corporation could not recover on the contract nor upon an implied contract arising from full performance on its part, the Court said, at page 342:

> "The plaintiff contends that the statute does not preclude the plaintiff from seeking redress in the Federal Court. This is undoubtedly the rule where the effect given to the state statute by the courts is that it merely prevents the maintenance of a suit by the delinquent corporation. *Johnson vs. New York Breweries Co.,* 178 Fed. 513; 101 C. C. A. 639. The rule is otherwise where the effect of the Legislature is to render void all contracts made and transactions done by the delinquent corporation within the State. *Johnson vs. New York Breweries Co.* 178 Fed. 513; 101 C. C. A. 639; *Chattanooga Building Association vs. Denson,* 189 U. S. 408; 23 Sup. Ct. 630; 47 L. Ed. 870.
>
> "The Alabama legislation has been construed by its court of last resort to invalidate contracts and transactions done within the state by foreign corporations which have not qualified themselves to engage in business therein. *Dudley vs. Collier,* 87 Ala. 431; 6 South 304, 13 Am. St. Rep. 55. *Alabama West Railroad Co. vs. Tally Bates Construction Co.* 162 Ala. 396, 50 South. 341; *American Amusement Co. vs. East Lake Chutes Co.* (Ala.) 56 South. 961. *Muller Co. vs. First National Bank of Dothan* (Ala.) 57 South. 762. The

> Federal Courts will follow the construction of the Alabama Constitution and Statutes in this respect. *Chatanooga Building Association vs. Denson,* 189 U. S. 408; 23 Sup. Ct. 630; 47 L. Ed. 870. *From this it results that no action can be maintained upon a contract, subject to this infirmity under the Alabama Statute in the Federal Court."*

The Pennsylvania Constitution, Article 16, Section 5, provides:

> "No foreign corporation shall do business in this state without having one or more places of business and an authorized agent or agents in the same upon whom process may be served."

This provision is identical with Article 11, Section 10, of the Idaho Constitution.

The Pennsylvania statute (P. L. 108, passed in 1874) is in part as follows:

> "Section 1. Be it enacted, etc., that from and after the passage of this act, no foreign corporation shall do any business in this commonwealth, until said corporation shall have established an office or offices and appointed an agent or agents for the transaction of its business therein.
>
> "Sec. 2. It shall not be lawful for any such corporation to do any business in this commonwealth, until it shall have filed in the office of the Secretary of the commonwealth a statement, under the seal of said corporation, and signed by the President and Secretary thereof, showing the title and object of said corporation, the location of its office or offices, and the name or names of its authorized agent or agents therein. * * * "

These provisions have been passed upon a number of times by the Circuit Court of Appeals of the Third Circuit.

In *McCanna and Fraser Co. vs. Citizens Trust and Surety Co.* 24 C. C. A. 11; 76 Fed. 420, the Court said, at page 421:

"The plaintiff did not comply with the second section, and consequently its business transacted here was unlawful. The construction and effect of the statute have several times been considered by the Supreme Court of the State (whose decisions in this regard are binding on us) and that Court has held that the transaction of business in Pennsylvania by a foreign corporation, under such circumstances, and all contracts pertaining to it, are unlawful."

The same rule was followed by that Court in the more recent case of *Pittsburg Construction Co. vs. West Side Etc. Co.* 83 C. C. A. 501; 154 Fed. 929, and in

Colonial Trust Co. vs. Montello Brick Works, 97 C. C. A. 144, 172 Fed. 310.

Buffalo Ref. Mach. Co. vs. Penn H and P. Co. 102 C. C. A. 196, 178 Fed. 696.

The Federal cases on the Oregon statute are also very instructive. There is no constitutional provision in Oregon corresponding to Article 11 of Section 10 of the Idaho Constitution, but there has been a similar statute since 1864. This statute was construed to render the contract void, and this construction was followed in the Federal Courts:

Commercial Bank vs. Sherman, 28 Ore. 573; 43 Pac. 658.

Re Comstock, 3 Sawy. 218, F. C. 3078.

Semple vs. Bank of Brit. Col. 5 Sawy. 88, F. C. 12659.

In 1903 the foreign corporation law was amended, and that statute confirmed the previous construction, providing in part as follows (*Lord's Oregon Laws,* Sec. 6726):

"Every foreign corporation * * * shall file the declaration and pay the entrance fees hereinafter provided and shall duly execute and acknowledge a

> power of attorney * * * and such power of attorney shall appoint some person * * * as attorney in fact for such corporation for service of process * * * . It shall be the duty of every such foreign corporation, joint stock company, or association, to maintain at all times within this State some qualified person as its attorney in fact as herein provided, and in default thereof it shall not be entitled to transact any business within this State *or maintain any suit, action, or proceeding in its courts.*" (Our italics).

In the case of *Cyclone Mining Co. vs. Baker Light and Power Co.* 165 Fed. 996, Judge Wolverton, in an able opinion, discussed the effect of this statute upon the contracts of non-complying corporations. The wording of the statute it will be seen upon comparison, is almost identical with that of the Idaho statute and apparently the 1903 act had not been construed by the Oregon Court at the time of the decision. In sustaining a plea in abatement to the complaint of the foreign corporation, the Court said:

> "It has been said that a corporation 'must dwell in the place of its creation, and cannot migrate to another sovereignty.' It cannot become a corporation or a citizen of any other state or sovereignty save that of its creation. If it does business in another state or sovereignty, it does so with the will or consent of the latter, either express or implied. By comity of the states as relates to the subject is meant that implied assent by which a foreign corporation is permitted to carry on its business in states other than that of its creation. As there may be comity of contract between different states and sovereignties, there may be comity of suit, which, without else, without express statutory regulations touching the subject, entitles a suitor to sue in jurisdictions other than his own. So that a foreign corporation may not only contract abroad, but may also sue abroad to enforce its contracts, under the rule of comity, where not superseded by statute or

other lawful regulation. A corporation may not transact business abroad, however, unless so permitted by comity or by some regulation of statute of the foreign jurisdiction. A state may withdraw its implied assent through comity, and it may inhibit the doing of such business within its borders absolutely, or it may impose such terms and conditions as it is so disposed, as a prerequisite to the exercise of such privilege. *And, where the policy of the state is thus made manifest in this respect through its legislation, the courts will not interpose to defeat its will, and will not give relief where none is intended, and especially where it is designed that such relief should be withheld.* These principles are adequately sustained by federal authority. (Citing cases). * * *

"*It would be a vain thing to insist that the Federal Courts are not bound to the observance of the rule. Are not they in duty bound to enforce state laws, where falling within their cognizance and not contrary to the Federal Constitution or the laws of Congress, as well as the national laws? If it were otherwise, the states and the Union could not well or long co-exist.*" (Our italics).

La Moine L. & T. Co. vs. Kesterson, 171 Fed. 980, is a later case in the same Court following the same rule.

We are fully aware that cases in the Federal Courts may be found which seem to support the decision of the learned Judge in *Colby vs. Cleaver,* and in the case at bar, but upon analysis it will be found that these cases have merely followed State statutes and courts holding, as in California, that the remedy on the contract is merely *suspended* until the foreign corporation complies with the law; or, as the New York courts expressly hold, that the statute merely *closes the State* courts to the foreign corporation. And in none of these States is there a constitutional provision similar to Article XI, Section 10 of the Idaho Constitution, which was held in *Katz vs. Her-*

rick, 12 Ida. 1, *to be self-executing and without any legislation to invalidate contracts made without compliance with its requirements.* This constitutional provision in effect says that every contract made in violation of it, is *unlawful.*

It is therefore submitted that the decision of the trial court is not only unsustained by authorities, but is in direct contravention to numerous decisions of the higher Federal Courts on very similar statutes. Furthermore, such a construction would render the Idaho statute practically nugatory. In our western States there are a great many foreign corporations doing business on a large scale, such as construction companies, surety companies, and the like, which have no regular agents and no property regularly within the State. In almost every action these corporations have occasion to bring, their claim exceeds the jurisdictional amount, and under this construction of the statute they can sue the citizens of the State in the Federal Court and yet themselvs be immune from suit because of their failure to designate an agent; and insofar as these statutes are designed for revenue purposes, the corporation can set them entirely at naught because it can have its remedy in almost any case in the Federal Court. In the case at bar, where the foreign corporation is not only seeking to enforce a contract which is invalid and unenforceable in the State Court, but to obtain the benefit of the statutory right of a mechanic's lien, we think there can be no question but that it is without remedy in the Federal Court sitting in Idaho and administering local law.

III.

The District Court Was Without Jurisdiction.

As under Equity Rules 47 and 48 a party whose presence will oust the jurisdiction of the court may be dismissed out of the action, provided he be not an indispensable party, the first question presenting itself is, what constitutes an indispensable party.

In *U. S. vs. Allen,* 179 Fed. 13, the Circuit Court of Appeals for the Eighth Circuit, defined indispensable parties as follows:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

The question whether the Union Portland Cement Company, a corporation of Utah, and the other lien claimants, also citizens of Utah, were such indispensable parties that the Court had no right to dismiss the action as to them, must be determined largely by a construction of the Idaho Mechanics' Lien Act and the Civil Code of that State. In so doing it must be borne in mind that while a particular right to a lien is obtained solely by virtue of a Mechanics' Lien Act, yet no special procedure is provided by that Act; but on the contrary, Section 5124 provides that

> "Except as otherwise provided in this chapter the provisions of this Code relating to civil actions, new trials and appeals are applicable to and constitute the rules of practice in the proceedings mentioned in this chapter."

In this respect the Act is analogous to the Illinois Mechanics' Lien Act of 1839, which provided that in proceed-

ings under it the court should be vested with the powers of courts of chancery and should be governed by the rules of procedure and decisions in these courts. And it has been accordingly held by the Illinois courts that the question of necessary parties must be determined by the rules of courts of equity, and that no decree should be entered unless all persons whose interests might be affected by the decree be made parties.

Kimball vs. Cook, 1 Gilm. 423.
Williams vs. Chapman, 70 Ill. 423.
Lomax vs. Dore, 45 Ill. 379.
Rall vs. Sullivan, 1 Ill. App. 94.

Section 4113 of the Idaho Civil Code provides: "The Court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties *the court must then order them to be brought in,*" and provides for the manner of bringing him in, etc.

Section 5120 of the Idaho Code relating to liens provides that in every case in which different liens are asserted against any property *the Court in the judgment must declare the rank* of each lien or class of liens which shall be in the following order, etc. (Providing for priorities).

It would seem clear that under these statutes it is essential that the Court not only determine the existence of a lien and its amount *but also its rank.* In order that the Court determine the rank of a lien it must necessarily *pass* upon all liens asserted against the property, and this

it could not do without the presence of the other lien claimants. These other lien claimants are therefore under equitable rules and the provision of Sec. 5120 of the Idaho Code indispensable parties without whose presence the Court cannot proceed to a decree.

It is apparent from the face of the amended bill filed in this cause and sworn to that the Portland Cement Company claims a lien upon the property in question. It was made a party for that reason. It was also apparent that it was a citizen of the same State as the complainant and that, therefore, this Court could not take jurisdiction, and it being an indispensible party, the Court could not dismiss it out in order to retain jurisdiction. This was not a case where Equity Rule 47 was applicable.

In *Gray vs. Havemeyer*, 53 Fed. 174, the necessity of having the lien claimants all before the court is well illustrated. That was a foreclosure to which various lien claimants were made parties. One of the lien claimants, Gray, appealed from the decree of the Circuit Court, assigning as error the refusal of the trial court to adjudge his claim to be the prior lien. Gray made the foreclosure complainants parties to his appeal, but omitted the balance of the lien claimants. The Court of Appeals said (p. 178):

> "The absence of necessary parties is perhaps the more readily conceivable with regard to the mechanics's lien-holders, who were adjudged to stand on an equality with the appellant. By the decree of the Circuit Court it was determined that all the lien-holders were entitled to share equally in the proceeds of the sale after the payment of costs of $12.00 to appellant, and of the sums due the mortgagees. The appellant now seeks to have it declared that he is entitled to priority over the other lien-holders. It is

apparent that if these parties had not been before the Circuit Court *its decree would not be binding in this particular.* That court had the right to adjudicate the question of priority between the several lien-holders because they had been made parties to the proceeding and had been duly served with process. The appellant now seeks to set aside the decree of the Circuit Court, and to have this Court adjudicate anew the question of priority between the several lien-holders, without bringing before this Court the parties whose rights are to be passed upon and settled by the decree now sought by appellant. The mortgagees had no interest in that question and cannot represent the absent parties. Of the persons interested in the matter of priority between the lien-holders, there is but one before the Court, to wit: the appellant. Upon what theory can it be held that this Court ought to proceed to consider the correctness of the decree of the Circuit Court on the question of the *relative priorities of the several lien-holders when none of them, save the appellant, would be bound by any decree we might enter.* The reasons demanding the enforcement of the general rule that a court should not proceed in a case, unless all of the parties whose interests will necessarily be affected by any decree that might be rendered are before the Court, are well stated in *Gregory vs. Stetson,* 133 U. S. 579 * * * ."

In the Stetson case the Supreme Court adopted the rule laid down by Story's Eq. Pl. Sec. 72, as to necessary parties in equity, and further said:

"The point was made in the court below and it is also pressed here, that Mrs. Pike being a non-resident and beyond the jurisdiction of the court, it was impossible to join her as a party defendant to this suit, and that it was therefore unnecessary to attempt to do so. The court below ruled against the complainant on this point, and we see no error in that ruling. The general question there involved has been before this Court a number of times and it is now well settled that notwithstanding the statute referred to and

> the Forty-seventh Equity Rule, a Circuit Court *can make no decree in a suit in the absence of a party whose rights must necessarily be affected thereby.*"

So the fact that the presence in the case at bar of the Union Portland Cement Company, and other Utah citizens claiming liens, as defendant, would oust the court of jurisdiction, is no excuse for dismissing them, as they were indispensable parties.

The Court, therefore, having improperly dismissed indispensable parties did not thereby acquire jurisdiction and did not have jurisdiction at the time of the appointment of the receiver herein. If the receivership fails the Union Portland Cement Company acquires no status as an intervenor but must be brought in as a defendant. The rule allowing intervention because the Federal Court has taken possession of a fund or property to which an intervenor makes claim if it can be sustained at all under the bill in this case, can only be sustained if the Court at the time of the appointment of the receiver had jurisdiction. Obviously a court lacking jurisdiction because of an indispensable party whose citizenship is the same as complainant, cannot acquire jurisdiction by appointing a receiver and allowing such party to come in as intervenor. *All the cases allowing parties to intervene without regard to their citizenship hold that the receiver must have been properly appointed, i. e. that the court originally had jurisdiction of the case.*

As said in *Newton vs. Gage*, 155 Fed. Rep. 598:

> "That the bringing in of a new party by crossbill or otherwise when the presence of such party as an original defendant would have defeated federal jurisdiction, violates both the constitutional and statutory requirement as to diverse citizenship is expressly held in *Shields vs. Barrow*, 58 U. S. 130, 15 L. Ed. 158 * * * "

So in the case at bar the Court will not permit jurisdiction to be obtained by the transparent device of dismissing the objectionable party only to bring it back as an intervenor.

The jurisdiction of the original bill in this case depends upon diverse citizenship. There is no Federal question involved. *Therefore, the jurisdiction must have existed at the time of the appointment of a receiver.* If it were otherwise all that would be necessary to enable parties to come into the Federal Courts would be the bringing of a suit between two citizens of different States and the appointment of a receiver. Then upon the appointment of the receiver other parties, *absolutely necessary to the determination of the cause*, but not having the requisite citizenship, might be brought in by way of intervening petitions. Such is not the meaning of the rule that possession or sequestration by the Federal Court draws to it jurisdiction of all persons claiming an interest therein. The *jurisdiction of the suit* under which the Court obtained possession of the property must exist at the time when it acquires such possession. *The possession cannot be used to give the Court jurisdiction of the original action.*

The Union Portland Cement Company endeavors to align itself as a complainant by alleging that there is no controversy between it and the Corey Brothers Construction Company and no question of priority between them. If the Corey Brothers Construction Company admits this, and further, if both the complainant and the intervenor concede that their claim shall share pro rata, then under the case of *Pacific R. R. Co. vs. Ketchum*, 101 U. S. 289,

it would appear that they have a right to join as complainants.

It is to be noted, however, that while the intervening petition admits that no priority is sought it does in effect claim to be equal in rank to Corey Brothers' claim, and there is nothing appearing on the record to indicate that Corey Brothers concede this. If this be not conceded then the positions of the complainant and intervenor are antagonistic and the Union Portland Cement Company must be aligned with the defendants unless by the receivership they may come in without regard to citizenship.

Question of lack of jurisdiction may be brought to the Court's attention at any time and if jurisdiction is not present the Court must proceed no further, but must dismiss the suit.

Judiciary Act of March 3, 1875.

Morris vs. Gilmer, 129 U. S. 315-326 (32 L. Ed. 690).

Anderson vs. Bassman, 140 Fed. 10.

It appears from the record, and is admitted in complainant's brief, that in February, 1911, many months before the appointment of the receiver, the Court, on complainant's motion, dismissed the action as to several other defendants, aside from Union Portland Cement Company, also lien claimants whose interests are adverse to complainants. These lien claimants were necessary parties, and their dismissal was doubtless for the purpose of avoiding a fatal and obvious objection to the jurisdiction of the Court. We respectfully insist that a court cannot thus be given jurisdiction, and that a receivership, based upon proceedings so fatally defective,

cannot confer on the Federal Court a right to adjudicate as between citizens of the same State in the absence of any other ground of Federal jurisdiction.

The Court will not proceed to a decree in the absence of necessary parties. Nor will the Court act on the theory that it has jurisdiction, because of the appointment of a receiver, when the record shows that when the receiver was appointed, had the necessary parties been made defendants, the Court would thereby have been ousted of jurisdiction. In this case the parties, residents of Utah, dismissed out of the suit, were necessary parties, and the Court, therefore, had no authority to dismiss them out. Had this unauthorized dismissal not taken place the record would have plainly shown on its face lack of jurisdiction.

Coryon vs. Millaud, 19 How. (U. S.) 113.
Adams vs. Howard, 22 Fed. 656.

While there was no plea of non-joinder of indispensable parties, the record as it stands shows their existence, their unauthorized dismissal, and that their presence would defeat the jurisdiction.

IV.

The Complainant Is Estopped to Assert a Lien Superior to That of the Trust Deed Securing the Bonds From the Proceeds of the Sale of Which Complainant Has Been Paid Seven Hundred Thousand Dollars.

The question of priorities of liens under the Mechanic's Lien Laws of the State of Idaho are governed more or less by the provision of Section 5114 of the Revised Code.

Therein, among other things, it is said that a mechanic's lien is preferred

> "to any lien, mortgage or other encumbrance of which the lien holder had no notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done, or the materials were commenced to be furnished."

This brings us to a question of fact, as to whether or not the plaintiff had notice of the trust deed prior to the time work was commenced.

In this connection Mr. Speer, who had charge of the negotiations leading up to the contract, testified (Dft's Testimony p. 5, et seq.) that he first met Corey in Denver in the Spring of 1909. Corey was a bidder on a Denver project, and Speer says that he and Rosecrans (he was one of the engineers of the Arnold Company) were going to Boise on this Big Lost River project, and he told Corey about it, and Corey went west from Denver with him and Rosecrans. Speer says he went over the whole proposition about the plans for the handling this Big Lost River project, and told Corey that they wanted to get somebody to work on the project at the earliest time possible, and that Trowbridge & Niver would advance money for the project until they could get the bonds out. He says he explained to Corey that the bond issue was to be used for the paying for the work, and Trowbridge & Niver Company would want him, if he took the contract, to go slow on the construction work until such time as they could get out plenty of bonds. He says he told Corey that after the opening, when the bonds became available, he then could go as fast as he liked because "we could sell the bonds and get money faster than he could spend it, but until that time he would have to go slow."

"At that time there were no funds available or in prospect for the project, except the proceeds of the sale of the bonds and except what Trowbridge & Niver would advance. I explained that fact to Mr. Corey and that the amount of money we could furnish would depend upon the condition of the bond market and how things worked at Denver." Again Speer testified: "In my conversation with Corey on the train, I told him that Trowbridge & Niver Company were to negotiate the sale of these bonds. The Big Lost River Irrigation Company was organized in every particular pursuant to the plan which I laid down to Mr. Corey. I carried out the plan of organization as outlined to Mr. Corey. The plan was outlined and that was subsequently just the way things were worked out."

"The estimates upon which Trowbridge & Niver Company made payments to Corey Brothers Construction Company were based upon the report of the field engineer, who would measure up the work and report to the Chicago office. In all these transactions I was acting on behalf of Trowbridge & Niver Company."

On cross-examination, the witness Speer testified (p. 20): "The reason I went into this matter with Mr. Corey was on account of his disappointment at Denver and his apparent anxiety to get the work. As I say, he rode on the train there, and we got acquainted with him. At this time there was no Lost River Company to make a contract, and Trowbridge & Niver would not want to make a contract wthout explaining all the circumstances" (p. 25). "The date of the first sale of the Big Lost River irrigation bonds was September 10, 1909, and altogether

I think we sold about $1,350,000 of these bonds. The first deliveries of these bonds were made September 10, 1909, and prior to that date Trowbridge & Niver Company had advanced to the Big Lost River Irrigation Company $209,516."

Mr. W. H. Rosecrans was a witness for the defendant, and he testified to coming out from Denver with Mr. Corey (Dft's. testimony p. 35).

"Corey asked me about the finances of this affair, and I explained the situation to him; that the Trowbridge & Niver people supplied the money for these projects from the sale of bonds; that the bonds were sold as rapidly as they could get them in, and that from the proceeds of these bonds the contractors were paid from time to time.

(p. 39): "It was suggested to him in my presence that Trowbrdge & Niver Company had taken over this project and were going to sell the bonds. I did not state to him on the train who was to sell the bonds, but had a further talk with him in Boise before Corey submitted his bid on the work. I explained to Mr. Corey that this matter would be handled just as it was subsequently handled; that Trowbridge & Niver would supply the money from time to time to carry on the work. I explained to him the system Trowbridge & Niver Company worked under was to sell the bonds on this project and from the sale the money would be supplied to the contractor. He wanted to know where the money had come from and I explained it to him."

(p. 41): "Mr. Speer and I told Corey who would supply the money before the bonds were issued, not at the early part, but later on when it came to making a contract, I explained this much further to him."

It is true that Mr. Corey denies these conversations in part, but Rosecrans and Speer are so well corroborated by the whole circumstances and surroundings that it is inconceivable that these facts were not made known to Corey.

The trust deed was subsequently executed pursuant to this plan and the bonds were sold. The deed was executed on the 27th day of August, 1909, and was approved by the Attorney General on the same date, was acknowledged by the Trust Company officers on the 30th day of August, 1909, and filed for record the 4th day of September, 1909, and there are outstanding bonds to the amount of $1,350,000, or thereabouts. (The exact amount is shown in record).

We then have this situation: The Construction Company, with knowledge of the fact that the trust deed is being issued to secure bonds for sale to procure money to pay for the construction work, undertakes the contract. The bonds are issued and sold, and practically $600,000 or more of the proceeds of them is paid to the contractor. It seems in the teeth of the statute and likewise inequitable that the contractor, knowing the purpose for which the bonds were issued, should have a lien for his work superior to the lien of said bonds.

In *Dickerson vs. Colgrove,* 100 U. S. 580; 25 L. Ed. p. 619, the Court said:

> "The estoppel here relied on is known as an equitable estoppel or an estoppel in pais. The law upon the subject is well settled. The vital principle is, that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations on which he acted. Such a change of position is sternly forbidden."

In several cases in which the facts vary only in minor details from the present, the mechanic's lien claimant has been held estopped as against mortgagees.

In *West vs. Klotz,* 37 Ohio St. 420, there was the additional circumstance that the contractors had bought some of the bonds and later sold them, but the Court seemed to emphasize the fact that the contractors had received a large part of the bondholders' money in silence. The Court said at page 429:

> "Klotz and Kramer are upon the plainest principles of equity precluded by their acts and agreements with the Steel Company from asserting such objections to the mortgage. They joined other citizens of Sandusky in accepting the proposition of the Steel Company to build a rolling mill; they subscribed to and paid for bonds issued by the Company and secured by the mortgage, and thereby induced others to do the same; they are beneficiaries under the mortgage; they received from the Steel Company in payment of more than two-thirds of their claim, the sum of $57,000.00, which they knew had been advanced to the Steel Company on the faith that this was a valid mortgage; they sold to others a large portion of the bonds they received from the Company and it is fair to say that their purchasers relied on the mortgage as a security. Under such circumstances there can be no justice in saying that, because they were not fully paid, as they expected to be, out of the moneys so loaned to the Steel Company, they may, on discovering that the Company and its guarantors have failed, assert a mechanic's lien for the balance of their debt, and thereby defeat the mortgage, which everybody interested in believed to be valid until the whole sum of $150,000.00 advanced on the faith of it, had bee nexpended."

In *McGraw vs. Bayard,* 96 Ill. 146, one Hayes was indebted to the plaintiffs for some buildings. He made three trust deeds of the property to defendant Bayard to

secure a loan. This was done with plaintiffs' assent who expected that they would be paid out of the proceeds and also that Hayes would pay off certain encumbrances on another piece of property he had conveyed to them subject to his removing the encumbrances. The Court said, at page 156:

> "In this case there really seems good ground to hold that the appellants are estopped from insisting that the lien of Bayard, the purchaser under the Smith trust deeds, is subordinate to their mechanics' liens."

Then after recounting the facts, the Court said, at page 157:

> "By their conduct in this regard appellants substantially said to the public that their right to a mechanic's lien on the property was in fact waived; that when the liens on the property purchased by them from Hayes should be removed, their claim would be satisfied. And to secure the performance of that duty by Hayes, their note for $6,000.00 was held by a third party and was not to be delivered until these encumbrances were removed. Bayard and his agents in the negotiation for the loan of this money upon these trust deeds, had a right from the circumstances to assume that this was the truth. Appellants thus put it in the power of Hayes to induce them to believe without misrepresentation that Bayard, by advancing the money, was acquiring a first lien on the property."

Bristol Goodson Elec. Lt. Co. vs. Bristol Gas El. Lt. & Power Co. 99 Tenn. 371; 42 S. W. 19, was a creditor's bill against an insolvent corporation. Bartlett, Hayward & Co. claimed a mechanic's lien for materials furnished while the other complainants were holders of mortgage bonds. The Court said in reference to the general question at page 380 of the Tennessee Report:

"Estoppel does not always rest on the intention of

the party to be affected by it, but is dependent rather, upon the reasonable or legitimate effect of his statement or conduct in the particular matter upon the course of other persons. He will not be allowed to assert his lien to the prejudice of persons whom he has induced to believe that his debt has been satisfied, or that he will claim no lien, and who, in that belief, have purchased property on which the lien rests or invested in bonds covered by mortgage thereon. As to such persons, he is absolutely concluded by his statements or conduct, though in fact contrary to the real truth of the matter; and in this connection, conduct includes both affirmative and negative action. Silence is sometimes as significant as a positive assertion, and, when of such import, is equally conclusive in favor of the party influenced thereby."

At page 385 the Court said:

"Epitomized the facts are as follows: Bartlett, Hayward & Company suggested the execution of the mortgage and the issuance of bonds inconsistent with and antagonistic to their claim of lien, consented to the consummation of that scheme thereafter in the hope of collecting their debt from the proceeds, gave aid to the Company in efforts to sell $50,000.00 of the bonds, and the Company ultimately sold them for value to innocent persons, who are not shown to have been influenced directly by the representations, statements of assurances of Bartlett-Hayward & Company. This makes a complete case of estoppel. Having helped to bring about the bond issue, and encouraged the Company to put $50,000.00 of the bonds on the market, Bartlett, Hayward & Company will not be permitted to assert their lien to the injury of the purchasers, though they may not have directly influenced them to buy. Encouragement to the Company with all the facts before them, made Bartlett, Hayward & Company responsible for the Company's action; and the Company by selling first mortgage bonds, represented the property as free from prior encumbrances. * * * The meaning of that representation so far as Bartlett, Hayward & Company are concerned, was that they had no prior lien on the

property, and to that extent they are bound as between themselves and the purchasers of the bonds."

For other cases see:

Com. Bldg. & Loan Assn. vs. Travette, 160 Ill. 390.

Hughes vs. McCasland, 122 Ill. App. 365.

Phillips vs. Gilbert, 2 McArthur (D. C.) 415.

Acker vs. Massman, 12 Ind. App. 696; 41 N. E. 77.

Spargo vs. Nelson, 10 Utah, 274; 37 Pac. 495.

The rule so clearly stated in the above cases shows that Corey Bros. Construction Company are estopped to claim a mechanic's lien against the holders of these mortgage bonds. Corey Brothers stood by in silence and allowed these defendants to advance money in the belief that there was no prior encumbrance on the property, although Corey Brothers knew all the facts. This was done with the intention that defendants should act and induced them to act to their detriment, and Corey Brothers have reaped the benefit of that action to the extent of $700,000.00 which they have received in payment. How, then, can it be said that they should not in equity and good conscience be estopped to claim this lien?

V.

Irrigation Works Constructed Under the Carey Act Are Not Subject to Mechanic's Lien Laws.

It is elementary that works of a public character are not subject to the mechanic's lien laws, unless the statute shows clearly an intention on the part of the Legislature to include such works within the scope of the statute.

The Idaho statute under which appellees claim their right to lien, reads as follows:

"Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of, any mining claim, building, wharf,

> bridge, ditch, dike, flume, tunnel, fence, machinery, ralroad, wagon road, acqueduct to create hydraulic power, or any other structure, or who performs labor in any mine or mining claim, has a lien upon the same for the work or labor done or materials furnished, whether done or furnished at the instance of the owner of the building or other imporvement or his agent; and every contractor, sub-contractor, architect, builder or any person having charge of any mining clam, or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purpose of this chapter: *provided,* That the lessee or lessees of any mining claim shall not be considered as the agent or agents of the owner under the provisions of this chapter."
>
> Sec. 5110, *Idaho Revised Codes.*

This statute was adopted in 1887, being Section 5125 of the Revised Statutes of 1887. The amendments that have been added since its first adoption have not extended the scope of the statute, except by including the word "dike," and by making certain changes in the procedure and in the details for perfecting and enforcing the lien.

Section 5125 of the Revised Statutes of 1887 was copied verbatim from the mechanic's lien laws of California, adopted in 1872, being Section 1183 of the California Code of Civil Procedure, adopted in that year. The California statute and the Idaho statute as originally adopted in 1887 read as follows:

> "Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wagon road, acqueduct, to create hydraulic power, or any other structure, or who performs labor in any mining claim, has a lien upon the same for the work or labor done or materials furnished by each

> respectively, whether done or furnished at the instance of the owner of the building or other improvement, or his agent, but the aggregate amount of such liens must not exceed the amount which the owner would be otherwise liable to pay."

The scope or substantial part of the statute has not been enlarged by new legislation in the State of Idaho, but it is limited to the identical structures which were intended to be included therein at the time of its first adoption in California in 1872, and the question here is, did the Legislature of California in 1872 and the Legislature of the State of Idaho in 1887 intend to include within the statute reservoirs, dams and irrigation systems constructed under the supervision of the State, pursuant to Section 4 of the Act of Congress, approved August 4, 1894 (28 Stat. 422), and the amendment thereto contained in Section 1 of the Act approved June 11, 1896 (29 Stat. 413-434), and Section 3 of the Act approved March 3, 1901 (31 Stat. 1188). The statutes above referred to constitute the legislation commonly referred to as the "Carey Act." These statutes and the subsequently enacted State legislation to carry out the provisions of said Acts of Congress were enacted many years after the mechanic's lien statutes were adopted.

At the time the mechanic's lien statutes were enacted the only "ditches" known to the law were such as were constructed by private parties for mining or irrigation purposes, and primarily for a private use. There was no authority under the law at that time for the construction by public authority or under public supervision and control of large irrigation systems of the kind and character now before the Court.

The courts have repeatedly held that the term "road" as used in the lien statutes does not include *public* roads or highways. Neither does it include *railroads*. They have likewise held that the term "bridge" as used in such statute does not include *public* bridges, or bridges on highways, or *railroad* bridges, and that the term "buildings" does not include *public* buildings or buildings forming a part of the plant of public service corporations required by such corporations in the discharge of their duties to the public, or in carrying out public franchises. They have likewise held that the term "any other structure" does not include *public* buildings or structures, or buildings of public service corporations essential to the discharge of their public duties. By parity of reasoning, it necessarily follows that the term "ditch" as used in the lien statutes does not include *public* ditches, or irrigation systems constructed by the State or under the supervision and control of the State for a public use.

In view of the importance of the subject, we deem it proper to submit at some length, the authorities bearing on the question.

Courts have uniformly declined to construe the mechanic's lien laws to have any application to buildings essential to the operation of the plants of public service corporations, except where such corporations were expressly and in clear and unmistakable language included in the act.

The Supreme Court of Wisconsin in *Chicago & N. W. Ry. Co. vs. Forest County et al.* 95 Wis. 89; 70 N. W. 77, says:

> "The franchises and rights of a *quasi* public corporation, owing important duties to the public, and

> the property vested in it necessary for their use and enjoyment, and the accomplishment of the purpose for which it was created, constitute an entirety, and in the absence of special statutory authority, are not subject to be seized and sold on execution, or for mechanic's liens, nor on tax process (citing many authorities)."

And the same Court, in *Chapman Valve Mfg. Co. vs. Oconto Water Co.* 89 Wis. 264; 46 Am. St. Rep. 830, in declining to enforce a mechanic's lien against the water company, among other things, says:

> "Nor can the plant be sold separately from the franchise to operate it. The franchises and corporate rights of the Companies, and the means vested in them, which are necessary to the existence and maintenance of the objects for which they were created, are incapable of being granted away or transferred by any act of the Company itself, or by any adverse process against it, unless it is authorized by a statute." (Citing cases.)

We quote from the syllabus of the same Court in the case of *Pittsburg Testing Lab. vs. Milwaukee Etc. Co.* 110 Wis. 634; 86 N. W. 592; 84 Am. St. Rep. 948:

> "Under the general merchanic's lien law, no lien attaches to a particular part of the railroad, or property of any other *quasi*-public corporation, essential to its operation and maintenance for public purpose."

It quotes with approval from *People vs. Herkimer,* 4 Cow. 348, as follows:

> "When a statute in general, and any prerogative right, title or interest would be divested or taken from the king, in such case he shall not be bound, unless the statute is made by express words to extend to him."

The Supreme Court of Pennsylvania, in *Plymouth Ry. Co. vs. Colwell,* 39 Penn. St. 337; 80 Am. Dec. 526, says:

"As to land which has been appropriated to corporate objects, and is necessary for the full enjoyment and exercise of any franchise of the company, whether acquired by purchase or by exercise of the delegated power of eminent domain, the company holds it entirely exempt from levy and sale; and this on no ground of prerogative or corporate immunity, for the company can no more alien or transfer such land by their own act than can a cheditor by legal process; but the exemption rests on the public interests involved in the corporation. Though the corporation in respect to its capital is private, yet it was created to accomplish objects in which the public have a direct interest, and its authority to hold lands was conferred that these objects might be worked out. They shall not be balked, therefore, by either the act of the company itself or of its creditors. For the sake of the public, whatever is essential to the corporate functions shall be retained by the corporation. The only remedy which the law allows to creditors against property so held is sequestration. *Susquehanna C. Co. vs. Bonham*, 9 Watts & S. 28 (42 Am. Dec. 315). And that remedy is consistent with corporate existence, whilst a power to alien, or liability to levy and sale on execution, would hang the existence of the corporation on the caprices of the managers or on the mercy of its creditors. For the corporation would cease to exist for the purposes of its institution, when its means of subsistence were gone. It might still have a name to live, but it would be only a life in name. A railroad company could scarcely accomplish the end of its being, after the ground on which its rails rest had been sold to a stranger. If such is in general the law of corporate tenures which are essential to corporate functions, it is peculiarly the law of this case where Freedly took his title from the sheriff, expressly subject to the franchises of the Plymouth Railroad Company."

The same rule was long ago announced by the Supreme Court of the United States in declining to apply to a railroad company the lien laws of North Carolina in the case

of *Commissioners of Buncombe County vs. Tommey,* 115 U. S. 122; 29 L. Ed. 305.

The Supreme Court of Pennsylvania in *Foster vs. Fowler,* 60 Penn. St. 27, in considering a case where a lien was claimed against the pumping engine and engine house of the water company, said:

> "Most people acquainted at all with corporate action, understand that corporations, other than municipal, which are purely public, naturally divide into public and private corporations; that is, into those that are agencies of the public directly affecting it, and those which only affect it indirectly, by adding to its prosperity in developing its natural resources, or in improving its mental or moral qualities. Of the former, are corporations for the building of bridges, turnpike roads, railroads, canals and the like. The public is directly interested in the results to be produced by such corporations, in the facilities afforded to travel and the movements of trade and commerce. It is well settled that this use is not to be disturbed by the seizure of any part of their property essential to their active operations, by creditors. They must recover their debts by sequestering their earnings, allowing them to progress with their undertaking, to accommodate the public."

The charter of the company in that case was quite similar to that of a Carey Act company, and provided for the eventual transfer of the water works system to the municipality, and, referring to that feature of the case, the Court said:

> "It is thus not only a public corporation, but is subject to become municipal property."

The Court then quotes with approval the rule laid down by the Court in *Susquehanna Canal Co. vs. Bonham,* 3 W. & S. 27, where it is said:

> "The privileges granted to corporations to construct turnpike roads, canals, etc., are conferred with a view

to the public use and accommodation, and they cannot voluntarily deprive themselves of the lands and real estate, and franchises which are necessary for that purpose; nor can they be taken from them by execution and sold by a creditor, because to permit it would defeat the whole object of the charter, by taking the improvements out of the hands of the corporation and destroying their use and benefit.'

"As a mechanic's lien is the foundation for process of sale, we should yield the principle thus clearly stated, by holding it applicable to erections of works of the description we are considering, having settled its object and use to be public. We think the remarks of Lowrie J., in *Williams vs. The Controllers*, 6 Harris 275, is in point here, '*that where there can be no execution, there can be no action* * * * '".

In *Guest vs. Lower Marion Water Co.* 142 Pa. 610; 12 L. R. A. 324, the question involved was almost identical with the one at bar. Plaintiff there was seeking to establish a mechanic's lien on the property and franchises of a public water works company supplying a municipality, which had an option to purchase at the end of twenty years. Plaintiff argued the Act of 1870, which made the property and franchises of corporations subject to sale on execution, had done away with the rule that the essential property of a public service corporation was not subject to mechanics' liens. The Court, after quoting from the statute, said:

"It is obvious that such comprehensive process was not designed for the collection of a judgment founded on mechanic's lien. This lien is statutory, and in the procedure for its enforcement the judgment and execution are restricted to the property bound by it. It is the policy of the law to keep intact the property belonging to and essential to the operations of a public corporation, and hence its creditors will not be allowed to divide such property and sell parts of it.

> It would be a signal abandonment of this policy and it would invite a division of the property to allow it to be sold on mechanic's lien process. This could not be done prior to the Act of 1870, and we discover nothing in that which authorizes it."

The leading case to the effect that railway property is not lienable is *Commissioners of Buncombe Co. vs. Tommey,* 115 U. S. 122, a case in which mechanic's lien claimants contested the priority of holders of mortgage bonds. After discussing the public nature of railroads, now universally admitted, the Court said:

> "Such being the relation existing in North Carolina between these corporations and the public, it should not be presumed that the Legislature intended to subject them to the operation of the ordinary lien laws, enacted for the benefit of those performing labor and furnishing material in the construction, repair or improvements of what a statute of 1870 designates as buildings, or who performs labor upon lots, farms and other property, belonging to private persons and having no connection with public object. A different construction of the statute would enable parties having liens for the amount within the jurisdiction of Justices of the Peace, to destroy the public highway and defeat the important objects which the State intended to subserve by its construction. No such intention should be imputed jects. A different construction of the statute clearly require it to be done."

Another early case to the same effect is *Dunn vs. North Missouri R. R.* 24 Mo. 493, where the Court said:

> "After the immense responsibility the State has assumed in building this and other railroads for the public use and convenience, it would be unreasonable to suppose power remained in any individual to deprive the public of the benefit contemplated by them. A lien with power of enforcing it by execution would enable the lien-holder to subject a portion of the road affected by it to execution, and the execution to be

effectual must confer a title to the purchaser under it. A power to effect by liens to be enforced by executions on public buildings might put it out of the power of the State to possess any public edifices. Would a mechanic or laborer under the lien law have the right to a lien for materials or services furnished in building a capital for the State? Shall buildings intended for the public benefit be taken from the public so soon as they are completed, or their completion be prevented by a sale of them, and the State be forever debarred of buildings for the accommodation of her agents?"

This case has been followed in the later Missouri cases of:

Schulenberg vs. Memphis C. & N. W. R. R. 67 Mo. 442.

Skranka vs. Rohan, 18 Mo. App. 340.

Pennsylvania first applied this rule to turnpike roads in *Ammant vs. New Alexandria & Pittsburg Turnpike,* 13 Serg. & Rawl, 210, and to a canal company in *Susquehanna Canal Co. vs. Bonham*, 9 Watts & Serg. 27.

The same rule is laid down in *Elliott on Railroads,* Last Edition, Section 106., and *Thompson on Corporations*, Last Edition, Section 3395.

In some cases it was said that to hold otherwise would be contrary to public policy, while in others the rule is based upon the fact that the ordinary methods provided by statute for the enforcement of a lien cannot be pursued against public property, and, there being no mode of enforcing the lien, it cannot exist.

First Nat. Bank of Idaho vs. Malheur Co. 30 Ore. 420; 35 L. R. A. 141.

20 Am. & Eng. Encyc. of Law, 296, and cases cited in notes 6 and 7.

Phillips on Mechanic Liens, Section 180, distinguish-

ing between corporations to which the mechanic's lien laws do not apply and corporations to which such laws do apply, says:

> "Of the former are corporations for the building of bridges, turnpikes, roads, railroads, canals, and the like. The public is directly interested in the results to be produced by such corporations, in the facilities afforded to travel and the movement of trade and commerce. In some states it is well settled that this use is not to be disturbed by the seizure by creditors of any of their property essential to their active operation. This direct benefit to and accommodation of the public very clearly distinguish this class of corporations from the second, viz., private corporations, or those in which the public is but indirectly interested, such as mining and manufacturing or coal and iron companies, etc., or libraries, literary societies, schools, and the like. Whether they progress or cease the public is not directly affected; and hence liens are enforceable against them without, as a general thing, without any regard to the effect upon their operations. But a corporation for introducing water into a town for the accommodation of its inhabitants is a public corporation, and its buildings, etc., necessary for carrying on its operations, and not subject to this lien. Although railroad companies, in some respects, resemble private corporations, yet, as they are organized for the public benefit, the state takes a deep interest in them, and regards them as matters of public concern. They are looked upon by the laws as corporations endowed with capacities for the promotion of the public good and for the diffusion of advantages to the state as a body politic. * * *
>
> *"It is said that it is better to suffer a mischief which is peculiar to one than an inconvenience which may prejudice many. This, however, is no mischief to the mechanic. He would subject the public to this great inconvenience, not because the public is in debt to him, not because he has not the same remedy for his debt that every other member of the community has, but that he may enjoy the privilege conferred on no other class of society.* Therefore where work

and labor are performed upon, or materials furnished for the line of a public railroad, built under authority of the state for public use, and by it contributed to, it is protected from the mechanics' lien. Public bridges are not subject to the merchanics' lien law which secures liens on bridges for work done thereon, or for materials furnished for their construction. A public bridge is a common highway. * * * Because bridges which are public highways can not be subject to the liens of mechanics, it does not follow that there may not be private bridges which will be subject to them." (Our italics.)

In discussing the right of a corporation holding a public franchise to dispose of such franchises or the property required in carrying on its public duties, the same author in Section 180, says:

"The right to erect a bridge, and to exact toll from passengers crossing it, is a franchise that can be granted only by the State. That right is personal, and cannot be transferred without express authority of law. In conferring the privilege, regard is had to the ability of the applicant to build and keep up the bridge; and, as personal considerations may influence the grant, the franchise of common right is not transferable."

And in Section 181 the author says:

"The decisions of many states undoubtedly establish that as the interest of the public in the administration of the public franchise survives the grant by which it is made the property of the corporation or an individual, and is paramount to the right of the creditors of the grantees, it can not be taken in execution and sold for the payment of debts. This is true, not only of the franchise itself, as, for instance, of the right to carry passengers and freight on a railroad, but of everything necessary to its enjoyment, and without which it cannot be exercised."

Boisot on Mechanics' Liens, in discussing the inapplicability of the Mechanics' Lien Laws to corporations of a public character, says (Section 188):

"Railroads are public highways, and it would be highly injurious to the public to have them interfered with. It has, therefore, been held with almost complete unanimity that the mechanics' lien laws will not be extended by implication so as to include railroads. Thus a statute granting liens on 'buildings or other improvements' does not include railroads. Neither does a statute giving liens on 'every buildings and every lot, farm, or vessel, or any kind of property not herein enumerated', nor one giving 'a lien for labor such as ditching, building levees,' etc., nor one giving a lien on 'houses, buildings, fixtures, and improvements and the land necessarily connected therewith, not exceeding fifty acres,' nor one giving a lien on any house, bridge, or other structure." (Citing many cases).

The same author, in discussing the exemption of public property from lien, Section 209, says:

"Public bridges are not subject to mechanics' liens, even under statutes that expressly grant a lien on bridges * * * and the property of a water company organized under a legislative charter which gives it the right of eminent domain, protects it from competition, compels it to furnish water at reasonable rates, and provides for the ultimate purchase of its works by the municipality, is exempt from mechanics' liens since such a company is a public corporation."

Dillon in the last edition of his work on Municipal Corporations, Volume 3, Section 993, in discussing the inapplication of mechanics' liens to buildings and works of a public character, says:

"Thus, county bridges, school houses, court houses, and other public buildings which cannot be sold under an execution, cannot, without a plain statute to that effect, be sold on foreclosure of a mechanics' lien; it is only such property as can be sold under a judicial process that is subject to such lien. Laws creating liens in favor of mechanics are enacted with

reference to that class of property which may be so sold." (Citing many cases.)

The Supreme Court of Nebraska in *Sherman County, Etc. Co. vs. Drake,* 65 Neb. 699; 91 N. W. 512, had before it a case where an ordinary irrigation company had completed a portion of its canal. The lower part of the canal consisted of a flume constructed for the purpose of carrying the water over a depression in the surface of the land to the extension which had not yet been undertaken. The flume as constructed was of no value in connection with the works already constructed and which had been used for irrigation purposes. Owing to deterioration and damage to the canal the system fell into disuse and had apparently been abandoned. The Company was unable to pay its obligations and a judgment creditor levied upon the flume. The Company brought suit to enjoin the sale, claiming intention of proceeding with the further construction and extension of its system. The trial court found that the company was insolvent and that the company had abandoned the intention of completing its canal over that part of the right of way which had been levied upon. The Supreme Court in reversing the decision said:

> "In our opinion the case is ruled by the decision of this court in *Bridge Co. vs. Means,* 33 Neb. 857, 51 N. W. 240; 29 Am. St. Rep. 514, in which it is held, in accordance with the general views of judicial authorities, that, in the absence of statutory enactment, the property of *quasi* public corporations, like the plaintiff, cannot be seized and sold upon process in actions at law. If the first of the facts found by the court constitute an exception, it would, in effect, abolish the rule, because the issuance of the execution, and its return *nulla bona,* as was done in this instance, would establish the fact of insolvency and justify the levy. Abandonment or non-

> user of corporate property and franchises is, under some circumstances, a ground of forefeiture, which may be enforced at the suit of the state, but it is not, of itself, a forfeiture or surrender, nor does it deprive the public of its interest, which, in a proper case, the state may preserve by resuming the franchise and bestowing it upon some one capable and disposed to effectuate the object for which it was created."

That the irrigation system upon which appellees have been decreed a lien is decidedly of a public character, and that the Big Lost River Irrigation Company is a public service corporation of such character that the rules laid down by the foregoing authorities apply and so operate as to deny the right to a lien, seems to us beyond question.

The record shows clearly that the assets of the Irrigation Company consist of the following rights and property:

(a) Contract, dated May 27, 1909, between George S. Speer and the State of Idaho for the construction of the irrigation system, which contract was, with the approval and consent of the State of Idaho, assigned to the Big Lost River Irrigation Company.

(b) A partially constructed irrigation system, constructed under the said contract and pursuant to the acts of Congress hereinbefore mentioned and the laws of the State of Idaho, enacted pursuant to and for the purpose of carrying out the provisions of said Acts of Congress, being Sections 1613 to 1634, inclusive, of the Revised Codes of Idaho.

(c) An equity in settlers' contracts, aggregating $1,950,148.19, of which there is on deposit with the appellants, as trustees, contracts of the par value of $1,836,816.27 as security for the bonds issued under the trust

deeds, under which appellants are trustees. Of the remaining settlers' contracts $101,851.92 par value, have been pledged by the Irrigation Company as collateral security for a promissory note, sometimes referred to as the Bradford and Starr note (Record, p. 354).

(d) An equity in the certificates of stock in Lost River Water Company, issued to settlers as evidence of their interest in the irrigation system, and by the settlers endorsed in blank and re-assigned to Big Lost River Irrigation Company as additional security for the deferred payments payable under the settlers' contracts, and by the Irrigation Company in turn deposited with appellents, as trustees, for additional security for the bond issue (Record, pp. 355, 565).

The State contract for the construction of the irrigation system is in the nature of a *franchise.* It is not a "ditch" or "structure" within the meaning of the mechanic's lien laws. On what theory the Court held the lien to attach to the contract the record does not show, and the opinion of the learned District Judge is silent on the point. It is ordered to be sold under the lien foreclosure, and to be transferred and conveyed to the purchaser at the foreclosure sale. On what authority or for what reason the record does not say. We apprehend that the only reason that could be assigned would be that this franchise or State contract is an "appurtenance" to the canal or works constructed by Corey Brothers, and for which material was furnished by the Union Portland Cement Company. But there can be no authority for holding such a contract or franchise an appurtenance. Such contention seems contrary to the elementary principles of the law of appurtenances.

We shall discuss later the question as to whether the State contract is assignable and transferrable without the consent of the State, and we pass now to a consideration of whether the irrigation works referred to are of such a public character as to bring them within the doctrine of the authorities cited above.

The Acts of Congress under which the works were constructed grant to the State a million acres, or as much thereof as the *State* may cause to be irrigated, reclaimed and occupied by actual settlers; the State is by these Acts "authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; but the State shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation and settlement." (28 Stat. 422).

The Federal Government recognizes no one but the State as the authority authorized to provide irrigation works for the reclamation of these lands. Section 1615 of the Revised Codes of Idaho (set forth in the appendix of brief) provides for the filing by the irrigation company desiring to contract with the State for the construction of such works, of a proposal with the State Board of Land Commissioners. The proposal must be in accordance with the rules of the Board and the regulations of the Department of the Interior, and it must show that application for a special permit to appropriate water for the irrigation of such lands has been filed in the office of the State Engineer. It provides that the water rights proposed to be sold to the settlers shall embrare "*a proportionate in-*

terest in the canal or other irrigation works, together with all rights and franchises attached thereto."

Section 1630 (appendix to brief) provides for free rights of way over the State lands for such irrigation works. The contract to be entered into by the State is required to contain certain stipulations and terms, reserving to the State control over the construction of the works so as to protect well the interest of the public against defaults on the part of the contracting company—the Big Lost River Irrigation Company in this case. The compensation which the irrigation company receives for the construction of the works is the franchise or right—exclusive in its nature, to sell water rights upon the terms contained in the State contract to all settlers on the lands segregated from the public domain under the said Acts of Congress.

The contracting company is not the owner of the works. The law does not require that it shall hold title to any of the structures or rights of way, or even to the water rights. It only requires that it shall have filed application with the State Engineer for a permit for sufficient water to reclaim the lands under the system. The free rights of way which the State grants or furnishes for such works do not become the property of the contracting company to be sold or disposed of as it sees fit. If it holds any title whatever to the works or water rights it is merely as Trustee during construction and until the water rights are disposed of to the settlers according to the terms of the State contract. The irrigation works are dedicated for the irrigation of the lands segregated under the Carey Act, and each settler receives under the law a

proportionate interest in all the works and in "all the rights and franchises attached thereto." Such interest the Company must agree to furnish him. ((Section 1615, Idaho Revised Codes). Such interest he must have before he can enter the land. (Section 1626). And such interest he must hold when he makes his final proof. Hence, when all the lands have been entered there is no interest left in the irrigation or contracting company, except the lien on the land and appurtenant water rights for the unpaid balance of the purchase price.

The contract with the State, to better carry out the provisions of the law, and to assist the settlers in taking over the system, provides (Record, pp. 471-474) that the contracting company in the case at bar should cause to be organized an operating company, to be known as the Lost River Water Company, Limited, to which corporation the irrigation works here involved should be conveyed; that the Lost River Water Company should be organized on a basis that each settler should receive one share of stock for each acre of land entitled to water from said system, and at the time an entryman purchased a water right the contracting company was required to issue to the purchaser one share of stock in the Lost River Water Company "for each acre of land entered or filed upon;" and upon the completion of the works, or whenever it was certified by the State Engineer that certain portions of the irrigation system were sufficiently completed for the delivery of water to the settlers, such works should be transferred to the Lost River Water Company for operation; and the management and control of the irrigation system, so far as it was possible under the law to vest it in any

one other than the individual settlers, was placed by the State contract in the Lost River Water Company. That corporation under the law holds the title in trust for the settlers or water users who are stockholders in the corporation.

State vs. Twin Falls Canal Co. 21 Ida. 410, 121 Pac. 1039.

In the above case the Idaho Supreme Court in construing the State statute, says:

> "Said statute contemplates that each owner of a water right has a proportionate interest in said entire irrigation works."

Speaking of the operating company, the Court also says:

> "The canal corporation was organized under the supervision of the State for the purpose of carrying out a certain duty resulting from a trust * * *"

Again the Court says:

> "The canal corporation is not one organized for profit, but is one organized really for the purpose of performing a public duty. The stock of that corporation represents the right to the water, and a refusal to deliver the stock amounts to a refusal to deliver water, and a refusal to perform the public duty for which the corporation was organized. * * *"

It also said:

> "The express purpose of said corporation being to receive from the said land and water company the title to the canals, dams and franchises of said last named corporation, and to manage them for its shareholders."

In the case at bar the Big Lost River Irrigation Company could not transfer the works to any one other than the Lost River Water Company without the consent of the State. That the works are decidedly of a public character, much more so than railroads and corporations furnishing water to cities and towns, can not be denied.

If mechanics' liens can attach to such works, the State in its undertaking to reclaim the desert lands within its boundaries cannot in advance of the building of such works lay out a definite course of procedure, with any assurance that it will be carried out. Any laborer, and any materialman, contractor or sub-contractor failing to receive his pay promptly or dissatisfied with the compensation received, or the estimate of work done, can cloud the title and entangle the system in litigation, the effect of which is inevitably to delay the completion of the works and the delivery of water to the settlers. The public inconvenience and embarrassment that must necessarily follow the application of the mechanics' lien laws to such works can readily be imagined. The mechanics' lien laws should not be construed to apply to such works unless the legislative intent is so clearly apparent that no other conclusion is reasonably possible.

The unfortunate delays which have resulted in the case at bar, and the hardships which they have worked upon the settlers and the great embarrassment that has resulted to the State, flow directly from the attempt to enforce appellees' liens.

In the opinion of the learned District Judge who decided the case, reference is made to the case of *Nelson-Bennett Company et al. vs. Twin Falls Land & Water Company*, 14 Idaho, 5; 93 Pac. 789, and the case of *Pacific Coast Pipe Company vs. Kings Hill Irrigation & Power Company*, not reported but decided by the District Court for the District of Idaho in December, 1911. We submit, however, that those cases are not controlling. The Pacific Coast Pipe Company case was based upon

the Nelson-Bennett case. In both cases the controversy was between the irrigation company and the lien claimant, and the Court did not attempt to determine what interest, if any, the irrigation company had in the irrigation works that could be sold upon a foreclosure of the lien.

In the case at bar appellants have a mortgage upon all the property of the irrigation company—the mortgage being expressly authorized by the contract between the contracting company and the State, and it was approved by the Attorney General, as provided in said contract; and in addition to having a general mortgage upon the irrigation system, water rights and other rights and franchises of the irrigation company, there have been pledged with the Trustees, settlers' contracts, or the amount due under such contracts, to an amount aggregating over $1,800,000.00 as security for the bonds issued. Appellants therefore have a two-fold lien or interest in the irrigation system and works decreed to be sold in this case:

(a) They have a general mortgage upon the unsold water rights and unsold capacity in the irrigation system; and,

(b) They have pledged with them the settlers' contracts which constitute a mortgage upon the undivided, proportionate and individual interest in the irrigation works, water rights and franchises sold to the settler by the irrigation company.

And it becomes necessary in this case for the Court to determine definitely whether the water rights and individual and proportionate interests in the system, sold to the settlers by the irrigation company, are subject and sub-

ordinate to appellees' liens, and also whether the Company has such interest in the unsold capacity of the works and in the remainder of the water rights that a mechanic's lien can attach thereto. These matters were not determined in the cases above referred to, and were not passed upon by the District Court in this case. In the Nelson-Bennett case the Court said:

> "If it be conceded by appellant that it has no interest in or title to any of this property, and no right of possession thereto, then we grant that the respondent can sell nothing at a foreclosure sale. This lien extends only to the interest, claim and right of the Twin Falls Land & Water Company. If it has no interest therein, it cannot suffer by foreclosure sale under this lien. If it has an interest therein, that interest may be sold at foreclosure sale * * *. In fact, however, the claim here made is only commensurate with the interests and rights of the appellant company. To that extent the action may be prosecuted and no further."

The District Court in the case at bar on this point, said:

> "If, as argued, most of the water rights have been sold, and such rights are exempt from the plaintiff's lien, and if therefore a lien upon the canal system is upon an empty shell, of little or no value, and if the State is not bound to recognize the purchaser at a foreclosure sale as the successor in interest to all of the construction company's rights, then, to be sure, there is need for solicitude on the part of the plaintiff, but not on the part of the mortgagee." (Record, pp. 651, 652.)

This method of disposing of a question may be convenient, but we submit that the conclusions reached and quoted above are inherently unsound, and such argument seems to us more plausible and specious than fundamental or convincing. These appellants have a right to demand that the title to the property upon which they hold a mort-

gage be not beclouded and tied up indefinitely in litigation resulting from the foreclosure of mechanics' liens upon an assumed interest of the mortgagor, which the Court upon further litigation may find either does not in fact exist or is not a lienable interest.

The Court in this case but laid the foundation for innumerable suits and postponed for future determination in such suits the question of whether the debtor has a lienable interest in the property ordered to be sold. It was clearly the duty of the Court in this case to determine whether the Big Lost River Irrigation Company had a lienable interest in the irrigation system covered by appellants' mortgage. It had no right to defer that question and order the property sold at judicial sale, leaving it to the prospective purchaser at such sale to determine at his peril whether he acquires anything or simply "an empty shell, of little or no value." Deferring a decision upon that question, with the suggestion that in the end it may develop that there was no property to which the lien could attach, does not tend to inspire competitive bidding, and the only effect of it is to inform the bidder in advance that he is only purchasing a law suit.

The learned District Judge also stated (Record, p. 652) that:

> "It is of no consequence that Carey Act projects were unknown when the lien statutes were enacted. Neither were railroads and telegraph lines known when the Constitution of the United States was adopted, but such instrumentalities are not therefore exempt from the operation of the interstate commerce laws of the Constitution."

The sweeping and comprehensive argument could be directed with equal force against the decision of the United

States Supreme Court in *Buncombe County vs. Tommey,* 115 U. S. 122; 29 L. Ed. 305, in which case the Court held that the lien laws of the State of North Carolina did not apply to a public service corporation like a railroad company. The language of the North Carolina statute, then before the Court, was as comprehensive, in so far as it related to the question before the Court in that case, as is the Idaho statute in relation to the question now before the Court.

In the Nelson-Bennett case the Idaho Supreme Court was not concerned with the rights of the mortgagee. The Court said:

> "In fact, however, the claim here made is only commensurate with the interest and rights of the appellant company. *To that extent* the action may be prosecuted *and no further.*" (Our italics.)

Accepting that statement at its par value, it necessarily follows that the lien could not attach to the interests which had been sold to the settlers, and upon which they in turn gave mortgages as security for the deferred payments, which mortgages (in this case called settlers' contracts) have been deposited with appellants as security for the bonds.

The Court in this case does not distinguish in the application or enforcement of the lien between the unsold capacity and the unsold water rights in the system, and those which have been sold to the settlers and entrymen. Appellant's mortgage is a direct lien only upon the unsold capacity and unsold water rights, or upon what the irrigation company has not sold to the settlers, and it only indirectly affects the interest in the system owned by the settlers. Such interest, as heretofore stated, has been mortgaged by the settlers as security for the de-

ferred payments of the purchase price, and such individual or settlers' mortgages or contracts have been deposited and pledged with appellants under their mortgage as additional security for the bonds. The Court by failing to distinguish between these decidedly different interests has thrown a cloud upon the title and water rights of some 700 or 800 settlers who are not parties to the suit. It is equivalent to foreclosing a mortgage without making the owner of the land a party to the suit.

The contracts or mortgages given by the settlers on their individual interests in the system show clearly that the Big Lost River Irrigation Company has no interest whatever in the water rights and undivided interest sold, except as mortgagee under the settlers' mortgages or water contracts (see defendants' Exhibit 77, record pp. 558-566, and State Contract, record pp. 468-474).

The Court by its decree has directed the irrigation system to be sold without making any provision for protecting the rights of either the settlers or appellants under the contracts pledged with appellants, and the effect of this decree must necessarily be to promote vexatious litigation and involve the settlers, the purchaser of the system at the Master's sale, and appellants in numerous suits to determine their respective rights and interests.

The statement of the Court in its opinion "that neither the State nor the purchasers of water rights are before the Court, and therefore such rights as they may have will not be affected by foreclosure decree" is of no substantial benefit in view of the unqualified and positive provisions of the decree that the Master shall sell the *entire* irrigation system and all the water rights connected therewith. If

such a rule is to prevail there is nothing left of the doctrine of indispensable parties. The Court should not enter any decree which must from necessity becloud the title of persons not before the Court, and result in expensive litigation to them in order to determine their rights as against appellees' liens and the interest acquired by the purchaser at the Master's sale.

We desire also to call the Court's particular attention to the fatal error of not making the Lost River Water Company a party to the suit. It was provided in the State contract that the Lost River Water Company should be organized for the purpose of taking over the operation and management of the irrigation system (Rec. 471-4). The record shows it was organized for such purpose. (Rec. 570-4), and that every settler and purchaser of a water right was given a share of stock in that company for each acre of land for which a water right was purchased (Rec. 354-6), and that such stock entitles tthe purchaser to a proportionate part of the water in the irrigation system here involved. By attempting to enforce the liens of appellees the Court abrogates all the provisions of the State contract and of the individual settlers' contracts pertaining to the Lost River Water Company, and it does so without the presence in court of that company or of the settlers affected by that portion of the decree.

The procedure, which the State required to be carried out in the sale of water rights, was as follows:

The Big Lost River Irrigation Company was required to sell water rights without preference or partiality, other than that of priority of application (Rec. 467), upon a form of contract approved by the State. Such contract provided that each purchaser should receive a certificate

of stock in the Lost River Water Company for as many shares as he purchased water rights. Such certificate, if the water right was not fully paid for, should be endorsed in blank by the settler and given to the Big Lost River Irrigation Company as additional security for the deferred payments (Rec. 473), the settler paying at the time of purchase $4.00 per acre in cash, the balance in installments extending over a series of years. The settler's contract was made a mortgage or lien upon the interest in the system which the settler purchased (Rec. 564). The Big Lost River Irrigation Company in turn, and as additional security for the bonds which it issued, assigned and transferred to appellants all payments due from the settlers under their respective contracts (See Trust Deed, Deft's Exhibit 67 and Rec. 354), and as security therefor it also assigned to appellants said contracts and the shares of stock in the Lost River Water Company and we respectfully submit that the Court in this case by its decree has made it impossible for the State of Idaho to carry out the plan which it adopted for the construction of these works and for the management of the irrigation system after the works were constructed. It has made it impossible for the settlers to receive what was sold them by the Big Lost River Irrigation Company and what the State required that they should have and receive for the payment which they made and the mortgage which they gave upon their property, and none of these parties are before the Court.

The fact that the settlers' contracts have been deposited and pledged with appellants, and that appellants are parties to the suit, does not justify the form or kind of decree that was entered in this case. A contract cannot be

cancelled or abrogated unless all the parties to it are before the Court.

VI.

Under the Laws of Idaho Irrigation Companies May Sell Water Rights Free and Clear of Existing Encumbrances on the System.

That the settlers purchased their undivided and proportionate interest in the irrigation system and water rights involved in this case, free and clear of the liens of appellees, can not in the face of the express provisions of the Idaho statutes, and the decisions of the Idaho Supreme Court be seriously denied.

Section 3292 of the Idaho Revised Codes reads as follows:

> "When any payment is made under the terms of a contract, by means of which payment a perpetual right to the use of water necessary to irrigate a certain tract of land is secured, said water right shall forever remain a part of said tract of land, and the title to the use of said water can never be affected in any way by any subsequent transfer of the canal or ditch property or by any foreclosure or any bond, mortgage or other lien thereon; but the owner of said tract of land, his heirs or assigns, shall forever be entitled to the use of the water necessary to properly irrigate the same, by complying with such reasonable regulations as may be agreed upon, or as may from time to time be imposed by law. And said payment for said water right shall be a release of any bond or mortgage upon the canal property of the person or company from whom such right is purchased or their successors or assigns, to the amount of such water right thus purchased and paid for, and said person or company from whom such water right is purchased shall furnish to the party or parties pur-

chasing such right, a release, or a good and sufficient bond for a release, from said mortgage or bonded indebtedness to the amount of the water right thus purchased."

This identical statute was before the Idaho Supreme Court in *Hewitt vs. Great Western Beet Sugar Company*, 20 Idaho 235, 118 Pac. 296, and it was there held that purchasers of water rights were not affected by the fact that there was an outstanding mortgage against the irrigation system, but notwithstanding such mortgage they could deal directly with the mortgagor or irrigation company and make payments to such company, and that the rights acquired from such company were not subject to the lien of the mortgage on the system. The Court said:

> "This statute became the law of this State on March 7, 1895, and was the law of this State at the time appellant accepted the mortgage involved in this case and became a part of his mortgage. This section is plain, and clearly provides that when payment is made upon a perpetual water right the water right shall remain a part of the tract of land for which the same is purchased, and the title to the use of said water can never be affected in any way by any subsequent transfer of the canal or ditch company, or by any subsequent foreclosure of any bond, mortgage or other lien. This section was enacted for the protection of the purchasers of water rights purchased from an irrigation system or canal company engaged in the diversion and transmission for use of the public waters of the State."

This important question was entirely ignored by the District Court. There can be no valid reason for not determining it in this suit. The interest of the settlers in the system has by them been mortgaged and the mortgages are held by these appellants, and if the settlers' interest is not subject to appellees' liens, appellants, as

mortgagees of such interest, have a right to demand that the decree does not involve them in unnecessary litigation or throw a cloud upon the title to property not subject to a lien. There is neither precedent, law, nor reason for the Court doing the vain thing of pretending to sell property which it has not previously determined it has the right to sell. The decree in this case should have expressly reserved the interest in the system sold to the settlers, and covered by the mortgages pledged with appellants as security for the bonds.

VII.

The Contract Between the State of Idaho and the Big Lost River Irrigation Company Dated May 27, 1909, *Is not Assignable Without the Consent of the State, and the Court Erred in Decreeing the Sale of Such Contract.*

It is settled law that a contract coupled with liabilities and financial responsibility and involving a relation of personal confidence and trust, is not transferrable or assignable without the consent of the other contracting party.

The Supreme Court of the United States in *Arkansas Valley Smelting Co. vs. Belden Mining Co.* 127 U. S. 379, 32 L. Ed. 246, said:

> "At the present day, no doubt, an agreement to pay money, or to deliver goods, may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the par-

ties that it shall not be assignable. But everyone has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'You have the right to the benefit you anticipate from the character, credit and substance of the party with whom you contract.' *Humble vs. Hunter*, 12 Q. B. 310, 317; *Winchester vs. Howard*, 97 Mass. 303, 305; *Boston Ice Co. vs. Potter*, 123 Mass. 28; *King vs. Batterson*, 13 R. I. 117, 120; *Lansden vs. McCarthy*, 45 Mo. 106. The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise: 'Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.' *Pollock, Cont.* 4th ed. 425."

This principle has been repeatedly applied by the Courts. See:

Demarest vs. Dunton Lumber Co. 161 Fed. 264.

Boston Ice Co. vs. Potter, 123 Mass. 28; 25 Am. Rep. 9.

Winchester vs. Howard, 97 Mass. 303; 93 Am. Dec. 93.

The Court in this case held that appellees had a lien upon the contract dated May 27, 1909, between the State of Idaho and George S. Speer, which contract was later assigned to the Big Lost River Irrigation Company with the consent and approval of the State.

We have heretofore referred to the proposition that there is no law under which appellees' liens could be extended to a contract or franchise of that kind, but, independent of that proposition an examination of the law under which the contract was made shows clearly that

such contracts are not transferrable or assignable without the consent of the State.

The contract is not one let to the lowest bidder upon public notice, but it is one resting upon the financial responsibility of the contracting company and upon the trust and confidence which the State reposes in that company to carry out its agreements and deal justly with the public or settlers for whom the works are constructed at the instance and under the supervision of the State.

Section 1615 of the Idaho Revised Codes (see appendix to brief) requires the corporation in its proposal to the State to set forth the names and place of residence of its officers and directors, and of the amount of its authorized and of its paid up capital, and in the case of an individual it requires the proposal to set forth all facts necessary to enable the State Board of Land Commissioners to determine the financial ability of the person seeking the contract to carry out the proposed undertaking.

The contract itself (Record 459) recites that Mr. Speer "has made a satisfactory showing as to the ability of himself and those whom he represents to construct the said irrigation works and to complete the same within the time allowed by law * * * ", and the record shows that Mr. Speer was a financier of standing and the partner in a large Chicago bond house.

The Court has undertaken to sell the contract to the highest bidder and to substitute for the contracting parties selected by the State, the highest bidder at the sale ordered by the Court. This, we respectfully submit, cannot under the law be sustained and it cannot be so easily disposed of as it was by the trial court, viz. that "if the

State is not bound to recognize the purchaser at the foreclosure sale as the successor in interest to all the construction company's rights, then, to be sure, there is need for solicitude on the part of the plaintiff, but not on the part of the mortgagee." Upon that same theory appellant's lien could have been extended to all property within the State of Idaho by whomsoever held, leaving it for future determination whether the purchaser at the sale as a matter of fact secured any property through his purchase. Such decrees do not settle contests or controversies, but can only serve as prolific sources of litigation, and, as stated before, they do not tend to inspire competitive bidding at judicial sales. There is nothing to commend such procedure, but there is every reason for condemning it.

Appellants as pledgees of settlers' contracts aggregating over $1,800,000.00, all made under and subject to the terms and provisions of the State contract, have a right to know how and in what manner the State contract is affected by appellees' liens, and whether the plan of construction and the plan for operating and turning over the system to the settlers outlined in the State contract will be carried out, whether the settlers must deal with the Court and the purchaser at the judicial sale or with the State, or the party with whom the State sees fit to contract for the completion of said sysem. The purchaser at the judicial sale is by no means the only person concerned over what becomes of the State contract and who, if any, is authorized to carry it out.

VIII.

The Irrigation System Cannot Be Sold Without the Right of Redemption.

The decree in this case directs that the irrigation system, property and assets of the Big Lost River Irrigation Company upon which appellees are decreed a lien, shall be sold without the right of redemption. It declares (Record p. 674):

> "And that under and by said sale all equity of redemption of the defendants * * * in and to said property, lands, rights and franchises be foreclosed and cut off and forever barred, and that said property be sold as an entirety and in one parcel without valuation, appraisement or redemption * * * by the Special Master of this Court (Record, 677). That upon the payment of the purchase price by the purchaser or purchasers of said property, said Special Master shall execute and deliver a deed, conveying the property purchased to said purchaser * * * and upon the execution and delivery of such deed the grantee thereunder shall be let into the possession of the premises conveyed."

This is in direct contravention of the Statutes of the State of Idaho. Section 4490 of the Idaho Revised Codes reads as follows:

> "Upon a sale of real property, the purchaser is substituted to, and acquires all the right, title, interest and claim of the judgment debtor thereto; * * * When the estate is less than a leasehold of two years' unexpired term, the sale is absolute. In all other cases the property is subject to redemption, as provided in this chapter. The officer must give to the purchaser a certificate of sale containing:
>
> "1. A particular description of the real property sold.
>
> "2. The price bid for each distinct lot or parcel;
>
> "3. The whole price paid.
>
> "4. When subject to redemption, it must be so stated. And when the judgment, under which the sale

has been made, is payable in a specified kind of money or currency, the certificate must also show the kind of money or currency in which such redemption may be made, which must be the same as that specified in the judgment. A duplicate of such certificate must be filed for record by the officer in the office of the recorder of the county."

Section 4492 provides that:

"The judgment debtor or redemptioner may redeem the property from the purchaser within one year after the sale, on paying the purchaser the amount of his purchase with ten per cent. interest thereon in addition * * *"

Section 4520 of the Idaho Revised Codes provides that:

"Sales of real estate under judgments of foreclosure of mortgages and liens are subject to redemption as in the case of sales under execution."

These identical statutes were before the Supreme Court of Idaho in the case of *Hewitt vs. Walters,* 21 Idaho 1; 119 Pac. 705. In that case the sale was a general receiver's sale, made for the purpose of winding up the corporation and paying its debts and labilities. It was not a *foreclosure* sale, as we have in this case, and it was there contended that even a receiver's sale could not be made without the right of redemption. The Court said:

"This objection presents a question which must be determined upon the peculiar facts and conditions of this particular case. In the first place, it is conceded that the statute of this State nowhere in express terms grants the right of redemption from a receiver's sale. The statute confers the right of redemption from sales made on execution (Sec. 4491) and foreclosure sales (Sec. 4520) and other sales under foreclosure of various liens. Under Sec. 4491, a creditor having a lien by judgment or mortgage on the property sold, subsequent to the lien on which the sale was made has the right of redemption, the same as the judgment debtor would have. The plaintiff in

this case would have under the statute the right to redeem the property from any sale made for the satisfaction of judgments or liens that were prior to his mortgage. * * *

"For discussions of the right and power of courts to order receiver's sales without the right of redemption, see the following authorities which have been cited by respective counsel:"

The Court then cites many cases showing that receivers' sales cannot be made without the right of redemption, and some holding that they can. The Court then adds:

"It is unnecessary, however, for us to determine that question in this case, and we reserve our judgment thereon, for the reason that the facts of this case remove it from the contingency above suggested."

The Court then shows that Hewitt was estopped from raising the question because of stipulations and because of the decree having become final without an appeal on that question having been taken therefrom. After discussing that question the Court says:

"In other words, the sale here being made is not a sale on foreclosure but is a sale by the Court's receiver under direct authority and supervision of the Court. The plaintiff has consented to and acquiesced in the order and decree and is now bound thereby."

The Idaho statute is identical with the California statute on the subject, and it has been frequently construed by the California Court. See:

Phillips vs. Hagart, 113 Cal. 552.

Eldredge vs. Wright, 55 Cal. 531

Levy vs. Burkle (Cal.), 14 Pac. 564.

In *Brown vs. Bryan*, 6 Idaho 1; 51 Pac. 995, the Court said:

"The Legislature has provided that all contracts in restraint of the equity of redemption are void."

See also:

Brine vs. Hartford Fire Ins. Co. 96 U. S. 627; 24 L. Ed. 858.

Loccy Coal Mine vs. Chicago W. & V. Coal Co. 131 Ill. 9, 8 L. R. A. 598, 22 N. E. 503.

Fitch vs. Wetherbee, 110 Ill. 475.

Simmons vs. Taylor, 38 Fed. 693.

Hammock vs. Farmers, Etc. Co. 105 U. S. 74, 26 L. Ed. 1111.

Mason vs. Northwestern, Etc. Co. 106 U. S. 163, 27 L. Ed. 129.

Providence, Etc. Co. vs. Camden, 177 Fed. 861.

In *Parker vs. Dacres*, 130 U. S. 43; 32 L. Ed. 848, the Supreme Court of the United States, in discussing this question, said:

> "This right when thus given is a substantial one to be recognized even in the courts of the United States sitting in equity, because the statute constitutes a rule of property in the State that enacted it."

The statute before the Court in that case was identical with the Idaho statute now before the Court.

In conclusion, appellants submit that appellees are not entitled to a lien upon any of the property covered by appellants' mortgage; that the decree is uncertain in that it does not specifically determine what property is subject to the lien, and what rights or property may be sold at the sale which the decree directs shall be made; and that the Court was without jurisdiction to enter any decree in this case because of the absence of necessary and indis-

pensable parties; that the right of redemption should not have been barred, and that plaintiff's lien should have been held void or unenforceable for failure to comply with the foreign corporation laws of the State.

Respectfully submitted,

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APPENDIX.

Provisions of Idaho Revised Codes Relating to Construction of Works Under the Carey Act.

Proposals to Construct Irrigation Works.

Sec. 1615. Any person, company of persons, association or incorporated company, constructing, having constructed or desiring to construct, ditches, canals or other irrigation works to reclaim land under the provisions of this chapter, shall file with the board a request for the selection, on behalf of the State, by the board, of the land to be reclaimed, designating said land by legal subdivisions. This request shall be accompanied by a proposal to construct the ditch, canal or other irrigation works necessary for the complete reclamation of the land asked to be selected. The proposal shall be prepared in accordance with the rules of the board and with the regulations of the Department of the Interior; and shall be accompanied by the certificate of the State Engineer that application for permit to appropriate water has been filed in his office, together with the State Engineer's report thereon. It shall state the source of water supply, the location and dimensions of the proposed works, the estimated cost thereof, the price and terms per acre at which perpetual water rights will be sold to settlers on the land to be reclaimed, said perpetual rights to embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto. In the case of incorporated companies it shall state the name of the company, the purpose of its incorporation, the names and places of residence of its directors and officers, the amount of its authorized and of its paid

up capital. If the applicant is not an incorporated company, the proposal shall set forth the name or names of the party or parties, and such other facts as will enable the board to determine his or their financial ability to carry out the proposed undertaking.

Application for Appropriation Permit to Be Filed.

Sec. 1617. The person, company of persons, association or incorporated company making application to the board for the selection of lands by the State, shall have filed with the State Engineer an application for a permit to appropriate water for the reclamation of the lands described in the request of the board. This application for a permit shall be of a form prescribed by the State Engineer, and shall be accompanied by two copies of a map of the land to be selected, and it shall show accurately the location and dimensions of the proposed irrigation works. The maps of the lands and proposed irrigation works shall be prepared in accordance with the regulations of the State Engineer's office and the rules of the Department of the Interior.

Submission of Proposal to State Engineer.

Sec. 1618. Immediately upon the receipt of any request and proposal, as designated in Section 1615, it shall be the duty of the Register to examine the same and ascertain if it complies with the rules of the board and the regulations of the Department of the Interior. If it does not, it is to be returned for correction; but, if it does so comply, it shall be submitted to the State Engineer, who shall examine the same and make a written report to the board, stating whether or not the proposed works are feasible; whether the proposed diversion of the public

waters of the State will prove beneficial to the public interest; whether there is sufficient unappropriated water in the source of supply; and whether or not a permit to divert and appropriate water through the proposed works has been approved by him; whether the capacity of the proposed works is adequate to reclaim the land described; whether or not the proposed cost of construction is reasonable; and whether or not the maps filed in his office comply with the requirements of said office and the regulations of the Department of the Interior; also whether or not the lands proposed to be irrigated are desert in character and such as may properly be set apart under the provisions of the aforesaid act of Congress and the rules and regulations of the Department of the Interior thereunder. Whenever the State Engineer shall be unable, from an examination of the maps and field notes submitted for his examination, to determine whether or not the proposed irrigation works are feasible and adequate, whether or not the proposed cost of construction is reasonable, or whether or not the proposed diversion of the public water would be beneficial to the public interest, and whether or not the lands proposed to be irrigated are of such a character as to come under the provisions of the aforesaid act of Congress, it shall be his duty to make, or cause to be made by some qualified assistant, such survey or examination as will enable him to report intelligently thereon to the board.

Contract With Proposed Contractor.

Sec. 1621. Upon the withdrawal of the land by the Department of the Interior, it shall be the duty of the board to enter into a contract with the parties submitting the

proposal, which contract shall contain complete specifications of the location, dimensions, character and estimated cost of the proposed ditch, canal or other irrigation works; the price and terms per acre at which such works and perpetual water rights shall be sold to settlers; and the price and terms upon which the State is to dispose of the lands to settlers. This contract shall not be entered into on the part of the State until the withdrawal of the lands by the Department of the Interior and the filing of a satisfactory bond on the part of the proposed contractor for irrigation works, which bond shall be in a penal sum equal to five per cent. of the estimated cost of the works, and shall be conditioned for the faithful performance of the provisions of the contract with the State.

Same; Limitations on Terms.

Sec. 1622. No contract shall be made by the board which requires a greater time than five years for the construction of the works, and all contracts shall state that the work shall begin within six months from date of contract; that at least one-tenth of the construction work shall be completed within two years from the date of said contract; that construction shall be prosecuted diligently and continuously to completion, and that a cessation of work under the contract with the State for a period of six months after the second year, without the sanction of the board, will forfeit to the State all rights under said contract.

Forfeiture of Contract for Contractor's Default.

Sec. 1623. Upon the failure of any parties, having contracts with the State for the construction of irrigation works, to begin the same within the time specified by the

contract, or to complete the same within the time or in accordance with the specifications of the contract with the State, to the satisfacton of the State Engineer, it shall be the duty of the Register to give such parties written notice of such failure; and, if after a period of sixty days from the sending of such notice, they shall have failed to proceed with the work or to conform to the specifications of their contract with the State, the bond and contract of such parties and all works constructed thereunder shall be at once and thereby forfeited to the State; and it shall be the duty of the board at once so to declare and to give notice once each week, for a period of four weeks, in some newspaper of general circulation in the county in which the work is situated, and in one newspaper at the State capital in like manner and for a like period, of the forfeiture of said contract, and that upon a fixed day proposals will be received at the office of the board in the Capitol at Boise City for the purchase of the incompleted works and for the completion of said contract, the time for receiving said bids to be at least sixty days subsequent to the issuing of the last notice of forfeiture. The money received by the board from the sale of partially completed works under the provisions of this section shall first be applied to the expenses incurred by the State in their forfeiture and disposal, and to satisfying the bond; and the surplus, if any exists, shall be paid to the original contractors with the State.

Application to Enter Land.

Sec. 1626. Any citizen of the United States, or any person having declared his intention to become a citizen of the United States (excepting married women) over the

age of twenty-one years, may make application, under oath, to the board, to enter any of said land in an amount not to exceed one hundred and sixty acres for any one person; and such application shall set forth that the person desiring to make such entry does so for the purpose of actual reclamation, cultivation and settlement in accordance with the Act of Congress and the laws of the State relating thereto, and that the applicant has never received the benefit of the provisions of this chapter to an amount greater than one hundred and sixty acres, including the number of acres specified in the application under consideration. Such application must be accompanied by a certified copy of a contract for a perpetual water right, made and entered into by the party making an application with the person, company or association, who has been authorized by the board to furnish water for the reclamation of said lands; and, if said applicant has at any previous time entered lands under the provisions of this chapter he shall so state in his application, together with description, date of entry and location of said land. The board shall thereupon file in its office the application and papers relating thereto, and, if allowed, issue a certificate of location to the applicant. All applications for entry shall be accompanied by a payment of twenty-five cents per acre, which shall be paid as a partial payment on the land if the application is allowed; and all certificates when issued shall be recorded in a book to be kept for that purpose. If the application is not allowed, the twenty-five cents per acre accompanying it shall be refunded to the applicant. The board shall dispose of all lands accepted by the State under the provisions of this

chapter at a uniform price of fifty cents per acre, half to be paid at the time of entry and the remainder at the time of making final proof by the settler.

Water Contracts a Lien on Lands Foreclosures.

Sec. 1629. Upon the issuance of a patent to any lands by the United States to the State, notice shall be forwarded to the settler upon the land. It shall be the duty of the board, under the signature of the president attested by its Register, to issue a patent to said lands from the State to the settler.

The water rights to all lands acquired under the provisions of this chapter shall attach to and become appurtenant to the land as soon as title passes from the United States to the State. Any person, company or association, furnishing water for any tract of land, shall have a first and prior lien on said water right and land upon which said water is used, for all deferred payments for said water right; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land; said lien to remain in full force and effect until the last deferred payment for the water right is fully paid and satisfied according to the terms of the contract under which said water right was acquired. The contract for the water right upon which the aforesaid lien is founded shall be recorded in the office of the recorder of the county where said land is situate. * * *

Rights of Way for Canals.

Sec. 1630. The maps in the office of the board of the lands selected under the provisions of this chapter, shall show the location of the canals or other irrigation works approved in the contract with the board, and all lands filed

upon shall be subject to the rights of way of such canals or irrigation works. Each right of way shall embrace the entire width of the canal and such additional width as may be required for its proper operation and maintenance, the width of right of way to be specified in the contracts provided for in this chapter.